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Filed January 7, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5618

A.S. GOLDMEN & COMPANY, INC.

v.

NEW JERSEY BUREAU OF SECURITIES,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 96-cv-05280)
District Judge: Honorable Dickinson R. Debevoise

Argued Thursday, May 21, 1998

BEFORE: ROTH[1], McKEE and GARTH, *Circuit Judges*

Reargued Friday, December 4, 1998

BEFORE: ALITO, McKEE and GARTH, *Circuit Judges*

(Opinion filed January 7, 1999)

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1. Judge Roth was obliged to recuse herself after argument but before clearance of this Opinion. Judge Alito took Judge Roth's place upon reconstitution of the panel and reargument.

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

This case raises a dormant commerce clause challenge to one aspect of the New Jersey Uniform Securities Law. The appellee, A.S. Goldmen & Co., Inc. ("Goldmen"), claims that N.J.S.A. § 49:3-60 ("§ 60") violates the dormant commerce clause insofar as it authorizes the appellant New Jersey Bureau of Securities to prevent Goldmen from selling securities from New Jersey to buyers in other states where purchase of the securities was authorized by state regulators. The district court agreed, and granted summary judgment in favor of Goldmen. We hold that § 60 does not run afoul of the dormant commerce clause, and therefore reverse.

I.

A.

Because of the noted potential for fraud and deception in the buying and selling of securities, securities markets are among the most heavily regulated markets in the United States.[2] Regulation of securities first flourished at the state level in the 1910s, when states began enacting laws that required the registration of a securities offering before the sale of the security was permitted. The purpose of these so-called "blue sky" laws was to allow state authorities to prevent unknowing buyers from being defrauded into buying securities that appeared valuable but in fact were worthless.[3] By 1933, all but one state had passed blue sky laws; today, all fifty states, the District of Columbia, Guam, and Puerto Rico have blue sky laws in force. *See* Louis Loss & Joel Seligman, 1 Securities Regulation 40-41 (3d ed. Rev. 1998) (hereinafter, "Loss & Seligman").

Aggressive federal regulation of securities markets began in the early 1930s with the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934. Today, the Securities and Exchange Commission ("SEC") administers these and five other federal statutes, which altogether form a complex web of federal regulations. *See id.* at 224-81. Despite this complex federal scheme, Congress, the courts, and the SEC have made explicit that federal regulation was not designed to displace state blue sky laws that regulate interstate securities transactions. *See, e.g.*, 15 U.S.C. § 77r(c) (1997) (preserving state jurisdiction "to investigate and bring enforcement actions with respect to . . . unlawful conduct by a broker or dealer") (National Securities Markets Improvement Act of 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 137 (1973) ("Congress

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2. Securities are the collective term used to describe documents that represent ownership in a company or debt. Common examples include stocks, bonds, notes, convertible debentures, and warrants. *See* Black's Law Dictionary 1215 (5th ed. 1979); Joseph C. Long, 12 Blue Sky Law § 2.01 (1997).

3. *See generally* Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 Tex. L. Rev. 347 (1991).

intended to subject [securities] exchanges to state regulation that is not inconsistent with the federal [laws]."); Loss & Seligman at 275-281. Although the enactment of the National Securities Markets Improvement Act of 1996 narrowed the role of state blue sky laws by expanding the range of federal preemption, federal and state regulations each continue to play a vital role in eliminating securities fraud and abuse. *See* Loss & Seligman at 60-62; Manning G. Warren III, *Reflections on Dual Regulation of Securities Regulation: A Case Against Preemption*, 25 B.C. L. Rev. 495, 497, 501-27 (1984) (describing how Congress, the courts, and the SEC have expressly authorized the enforcement of state blue sky laws).

B.

Among blue sky laws, the most common regulatory approach is the mixed disclosure and merit regulation scheme offered by the Uniform Securities Act ("Uniform Act").[4] Drafted in large part by the late Professor Louis Loss, the Uniform Act has been adopted with some modification in nearly forty states, including New Jersey. *See* N.J.S.A. § 49:3-47 to 76. The Act contains three essential parts: provisions requiring the registrations of securities sold within the state; provisions requiring the registration of persons involved in the securities industry; and various antifraud provisions. *See id*; *see also* Joseph C. Long, 12 Blue Sky Law § 1.07 (1997) (hereinafter, "Long").

This case raises a constitutional challenge to N.J.S.A. § 49:3-60 ("§ 60"), which is New Jersey's codification of the portion of the Uniform Act that makes it "unlawful for any security to be offered or sold in this State" unless the security is either registered by state authorities, is exempt

4. The various state and federal securities regulations reflect two broad regulatory philosophies: merit regulation and disclosure. Regulations based on disclosure principles, such as the federal Securities Act of 1933, seek to provide investors with all material and relevant information about the securities and the company offering them. In contrast, merit regulations seek to protect investors by prohibiting transactions that authorities deem unfair or unjust. *See* Joseph C. Long, 12 Blue Sky Law § 1.05 (1997).

under N.J.S.A. § 49:3-50, or is a federally covered security.[5] When read in conjunction with N.J.S.A. § 49:3-51(c), which states that "an offer to sell or buy is made in this State . . . when the offer . . . originates in this State," § 60 grants New Jersey regulatory authorities the power to regulate the offer or sale of all non-exempt, non-covered securities whenever the offer is made within the state of New Jersey. Under N.J.S.A. § 49:3-64 and the 1985 amendments to the New Jersey statute, this authority permits the chief of the New Jersey Bureau of Securities ("Bureau") to exercise broad powers to regulate sale of such securities in New Jersey when it is deemed in the public interest and various statutory requirements have been met.

II.

A.

A.S. Goldmen & Co. is a securities broker-dealer with its sole office located in Iselin, New Jersey.[6] At the time of proceedings before the District Court, Goldmen's sole office was located in New Jersey. Since that time, it has opened at least one other office out of state.

Goldmen specializes in underwriting the public offerings of low priced, over-the-counter securities, and then selling those securities in the secondary market. During the first several months of 1996, Goldmen planned the initial public

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5. In its current form, N.J.S.A. § 49:3-60 (1997) states:

> It is unlawful for any security to be offered or sold in this State unless:
> (a) The security or transaction is exempt under section 3 of P.L.1967, c. 93 (C.49:3-50);
> . . .
> (e) The security is registered under this act; or
> (f) It is a federal covered security for which a notice filing and fees have been submitted as required by section 14 of this act (C.49:3-60.1).

6. A "broker-dealer" is defined by the Act as "any person engaged in the business of effecting or attempting to effect transactions in securities for the accounts of others or for his own account." N.J.S.A. § 49:3-49(c).

offering of Imatec, Ltd. ("Imatec"). Imatec is a Delaware corporation, located in New York, that was formed in 1988 to develop, design, market, and license image enhancement technologies. Goldmen planned for the Imatec securities to be traded as a NASDAQ Small Cap stock because such stocks are exempt from initial federal registration requirements, *see* 15 U.S.C. § 77(d) (1997). The primary regulation of the Imatec security during the first 25 calendar days of the offering would occur at the state level. *See* 17 C.F.R. § 230.174(d) (1992). Accordingly, in May 1996, Goldmen concurrently filed registration statements with the SEC, and also attempted to register the offering "by qualification" with state regulatory authorities in over a dozen states, including New Jersey.[7]

The prospectus filed by Goldmen with the New Jersey Bureau of Securities ("the Bureau") listed Goldmen as the sole underwriter, and also indicated that Goldmen would own the shares to be offered to the public. Reviewing Goldmen's application, the Bureau expressed various concerns regarding the Imatec offering to Goldmen's counsel. Although the Bureau was not prepared to make allegations of fraud, it had already been investigating Goldmen's business practices at that time, and was concerned that the combination of Goldmen's practices and the bleak financial prospects of Imatec made the offering a high-risk investment that was likely to be associated with abusive and manipulative sales practices.

On August 7, 1996, the Bureau informed Goldmen's counsel that it was considering the issuance of a stop order that would block the Imatec offering from being registered in New Jersey. Goldmen's counsel and the Bureau then entered into negotiations concerning the future of the Imatec offering. On October 23, 1996, these negotiations

7. Registration "by qualification" is the most comprehensive form of blue sky registration, and is generally necessary when the security is exempt from initial federal registration requirements. The other types of registration, registration "by notification" and registration "by coordination," are much simpler and are reserved for securities that carry a higher indicia of reliability than securities that must be registered by qualification. *See* N.J.S.A. § 49:3-61 (describing requirements for registration by qualification).

resulted in a Consent Order signed by the CEO of Imatec and the Bureau chief. According to the Consent Order, Goldmen withdrew its application to register the Imatec offering in New Jersey, and agreed that the Imatec offering did not qualify for N.J.S.A. § 49:3-50(b) exemptions to the registration rule of § 60. Goldmen was permitted to make *unsolicited* sales from New Jersey or to sell to certain financial institutions or to other broker-dealers. However, the Consent Order specifically denied Goldmen exemptions that would have allowed it to solicit members of the public to purchase Imatec stock in the secondary market. App. 38-41; App. 156-57.

Five days after Goldmen entered into the Consent Order, on October 28, 1996, the registration statement that Goldmen had filed with the SEC became effective.[8] As of that date, Goldmen had managed to register the Imatec offering in sixteen states, but had been forced to withdraw its registration in several others, including New Jersey.

On the morning of October 29, 1996, Goldmen commenced the initial public offering from its office in Iselin, New Jersey. By telephone, Goldmen solicited sales to individuals outside of New Jersey, but did not solicit any sales to individuals within New Jersey. By 3 p.m. of that day, Goldmen had sold the entire public offering.[9] Subsequently, Goldmen continued to buy and sell Imatec securities in the interdealer market from its New Jersey office.

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8. Registration with the SEC does not imply SEC approval of the offering. *See* 15 U.S.C. § 77w (1997) ("[T]he fact that the registration statement for a security has been filed or is in effect . . . shall [not] be deemed a finding by the Commission that the registration statement is true and accurate on its face . . . , or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security.")

9. We do not regard this case as moot despite the fact that the Imatec offerings are concluded. We are concerned that this kind of case presents a problem that may be capable of repetition but avoiding review with respect to Goldmen. *Weinstein v. Bradford*, 423 U.S. 147 (1975). Due to the nature of Goldmen's business, this same problem may be confronted in the future.

The Bureau learned of Goldmen's sales on November 7, 1996. Because the window for state regulation of the Imatec offering closed 25 days after the offering began,[10] the Bureau acted immediately, notifying Goldmen that it believed that the sales violated the Securities Act and the Consent Order. Goldmen took the position that its sales violated neither state law nor the consent order, and informed the Bureau that it intended to continue to buy and sell securities from its New Jersey office. The Bureau responded by issuing a Cease and Desist Order dated November 12, 1996, which ordered Goldmen to "cease and desist from the solicitation of customers, offer and sale of Imatec in or from the State of New Jersey to any members of the public." App. 91.

B.

On the same day that the Bureau issued the Cease and Desist Order, Goldmen filed this declaratory judgment action against the Bureau in federal district court. Goldmen's complaint claimed that "the New Jersey Securities Act, as applied to securities that were not registered or exempt from registration in New Jersey and were sold by brokers located in New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale, violates the Commerce Clause of the United States Constitution." The complaint also alleged that even if the Securities Act was constitutional, the Act and the Consent Order did not apply to block Goldmen's sales of Imatec securities from New Jersey. According to Goldmen, the sole legal effect of the Act and the Consent Order was to prohibit Goldmen from selling the securities to buyers located in New Jersey.

The district court issued an Order to Show Cause, and held a hearing on November 20, 1996.[11] The district court

10. Under 15 U.S.C. § 77r(b)(4)(A) and 17 C.F.R. § 230.174(d), the Imatec security became a "covered security" 25 days after the initial public offering. At that time, state regulation was preempted. *See* 15 U.S.C. § 77r(a)(1)(A) (1997).

11. At the hearing, the Bureau argued that Goldmen's federal action should be stayed under the abstention principles enunciated in *Younger*

issued a preliminary injunction the same day, enjoining the Bureau from taking any action that would prohibit Goldmen from "soliciting, offering or selling securities that are not registered or exempt from registration in New Jersey to residents of states (other than New Jersey) in which the securities are qualified for sale." App. 402-03.

The case then proceeded to cross-motions for summary judgment. On August 21, 1997, the district court granted Goldmen's motion for summary judgment and denied the Bureau's summary judgment motion. The sole issue addressed was whether the New Jersey Uniform Securities Law violated the dormant commerce clause by authorizing the Bureau to block the sale of securities from New Jersey to buyers in other states where the security was registered. The district court concluded that it did. According to the district court, the law directly regulated interstate commerce because it effectively allowed the Bureau "to impose New Jersey securities regulations onto other states." The district court argued that "[t]o allow the Bureau to preclude consumers in other states from receiving solicitations to purchase securities which their own state regulators have deemed appropriate for purchase is, in essence, to allow the Bureau to substitute its own regulatory judgment for that of other states." Further, the district court argued that absent allegations of fraud, the Bureau had no interest in regulating such transaction. Accordingly, the New Jersey Uniform Securities Law imposed an excessive burden on interstate commerce in relation to New Jersey's local benefits. App. 581 (citing *Pike v. Bruce Church*, 397 U.S. 137 (1970)).

The Bureau filed a timely appeal.

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v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971). The district court rejected this argument. App. 446. Because the Bureau has chosen not to raise this issue on appeal, we will not address it further. *Compare Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477-80, 97 S.Ct. 1898, 1904 (1977).

III.

A. Legal Framework

The Supreme Court has long construed the Commerce Clause as implying a judicial power to invalidate state laws that interfere improperly with interstate commerce. *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). One consistent strain of these cases authorizes courts to invalidate state regulations when their extraterritorial impact is so great that their "practical effect . . . is to control conduct beyond the boundaries of the state." *Healy v. The Beer Institute*, 491 U.S. 324, [illegible] 109 S.Ct. 2491, 2499 (1989). As Justice Cardozo explained in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523, 55 S.Ct. 497, 500 (1935), such a power is necessary to prevent states from applying "parochial" laws that can bring about "a speedy end of our national solidarity." "The Constitution," Justice Cardozo stated, "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Id.*

According to these "extraterritorial effects" cases, a state may not attempt to regulate commerce that takes place "wholly outside" of its borders: such a "projection of one state regulatory regime into the jurisdiction of another State" is impermissible. *Healy*, 491 U.S. at 336-37; 109 S. Ct. at 2499. Under this rubric, the Supreme Court has invalidated state laws that restricted interstate movement of goods based on the price paid for them in out-of-state transactions. *See, e.g., Baldwin*, 294 U.S. at 521, 55 S. Ct. at 499 (invalidating New York law that banned the importation of milk into New York when the price paid outside of New York to the out-of-state producer was lower than that permitted under then-existing laws regulating milk purchases from New York producers); *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 61, 42 S. Ct. 244, 248 (1922) (invalidating North Dakota law requiring exported wheat to be sold outside of North Dakota at price set by North Dakota state inspector). Similarly, the Court has struck down state laws that prohibited the importation of out-of-state goods unless the importer guaranteed that its

in-state prices were no higher than elsewhere. *See, e.g., Healy*, 491 U.S. at 337, 109 S. Ct. at 2499 (invalidating Connecticut law prohibiting beer imports unless seller guaranteed that prices offered in Connecticut were no higher than in neighboring states); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 2084 (1986) (invalidating New York law requiring liquor importers to affirm that prices offered to New York wholesalers were lowest nationwide). Finally, the Court has invalidated laws granting officials in one state the authority to block multistate transactions that only marginally involve in-state interests. *See Edgar v. MITE Corp.*, 457 U.S. 624, 643-46, 102 S. Ct. 2629, 2641-42 (1982) (invalidating Illinois law that authorized Illinois officials to block substantively unfair takeovers of multistate companies that had connections to Illinois and also other states).

Of course, these cases do not establish that the states are forbidden categorically to regulate transactions that involve interstate commerce. *See H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 532-33, 69 S. Ct. 657, 662 (1949) (Jackson, J.) (recognizing that States have "broad power . . . to protect its inhabitants against . . . fraudulent traders . . . even by use of measures which bear adversely upon interstate commerce"). Rather, states are permitted to regulate in-state components of interstate transactions so long as the regulation furthers legitimate in-state interests. A particularly relevant example of this is *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S. Ct. 217 (1917), and its companion cases, *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559, 37 S.Ct. 224 (1917) and *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227 (1917) (collectively, the "*Blue Sky Cases*"). In the *Blue Sky Cases*, the Court considered dormant commerce clause challenges to then-recently enacted Blue Sky laws in Ohio, South Dakota, and Michigan. Although the three statutes differed somewhat, each granted state securities commissions the authority to block the in-state sale or purchase of unlicensed securities. The laws were challenged both by unlicensed in-state securities sellers and the out-of-state purchasers who had traveled in-state to make their purchases, but the Court rejected their claims that the laws

violated the dormant commerce clause. The key to the laws' constitutionality, the Court held, was that "[t]he provisions of the law . . . apply to dispositions of securities *within* the state." *Hall*, 242 U.S. at 557, 37 S. Ct. at 223 (emphasis in original). By limiting the scope of the statute to dispositions of securities "*within* the State," the Court announced, the states had merely enacted "police regulation[s]," that "affect[ed] interstate commerce . . . only incidentally." *Id.* at 558, 37 S. Ct. at 223; *see also CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 93, 107 S.Ct. 1637, 1651-52 (1987) (rejecting challenge by out-of-state company to Indiana law conditioning acquisition of corporate control of Indiana corporation on approval of a majority of the pre-existing disinterested shareholders, reasoning that law regulated in-state corporations); *cf. Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 200, 45 S. Ct. 481, 485 (1925) (invalidating North Dakota law that regulated in-state handling of wheat headed for interstate commerce that served no legitimate in-state interests).

B. Territoriality

As these cases indicate, the constitutionality of state regulations of interstate commerce depends largely on the territorial scope of the transaction that the state law seeks to regulate. If the transaction to be regulated occurs "wholly outside" the boundaries of the state, the regulation is unconstitutional. *MITE Corp.*, 457 U.S. at 642. If the transaction occurs "within" the boundaries of the state, it is constitutional so long as the regulation furthers legitimate in-state interests. *See id.* at 643-46; *CTS Corp.*, 481 U.S. at 93.

Therefore, the first issue we must address is the territorial scope of the transaction that New Jersey has attempted to regulate. The question is, what is the territorial basis of a contract entered into by telephone between a New Jersey broker soliciting sales of Imatec securities from New Jersey, and an out-of-state buyer who agrees to purchase them outside of New Jersey? More particularly, can it fairly be said that such a transaction occurs "wholly outside" New Jersey? As this is a legal question, our review is plenary. *See Ciarlante v. Brown &*

Williamson Tobacco Corp., 143 F.3d 139, 145 (3d Cir. 1998).

Goldmen and the Bureau offer divergent views of § 60's territorial scope. Goldmen argues that § 60 permits New Jersey to reach out beyond its borders and block willing buyers from completing transactions authorized by their home states. According to Goldmen, "the effects of the Bureau's application of Section 60 is not to regulate in-state brokers, but to preclude out-of-state residents from purchasing a product deemed appropriate for sale by their own regulators." Br. at 20. Goldmen suggests that the offer's origin in New Jersey is not relevant to the transaction's territoriality, because "the 'practical effect' of permitting New Jersey to bar the sale of securities from New Jersey into states where those securities have been qualified for sale is that those out-of-state residents will be precluded altogether from receiving the opportunity to purchase these securities." *Id.* at 16.

The Bureau's position is that § 60 regulates the offering of securities entirely *within* the state of New Jersey. According to the Bureau,

> Section 60 simply regulates how brokers located in New Jersey conduct business from their New Jersey offices. In this instance, these were Imatec securities ... offered for sale by the underwriter through solicitations of the public from New Jersey. The offer and sale arose in New Jersey. Goldmen chose to domicile its highly-regulated business in New Jersey and to conduct that business from within the State.

Br. at 27.[12] The Bureau concedes that § 60 may affect interstate commerce, to the extent that sellers such as Goldmen try to sell securities to buyers in other states. However, the Bureau contends that this is merely an indirect effect of what is essentially New Jersey's regulation of New Jersey parties seeking to sell securities in New Jersey.

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12. Both amici, North American Securities Administrators Association and the Securities and Exchange Commission, support the position taken by the New Jersey Bureau of Securities that § 60 does not violate the dormant commerce clause.

In resolving this question, we begin by noting that notions of the territorial scope of contracts between citizens of different states have evolved in the past century. At one time, it was fashionable to conceive of contracts between diverse parties as being rooted in a single geographical location, such as the place the offer was accepted. *See, e.g.*, Joseph H. Beale, *What Law Governs Validity of a Contract*, 23 Harv. L. Rev. 260, 270-71 (1910). Under this traditional approach, it was believed that when a contract offer made in New Jersey was accepted in New York, the contract was "made" in New York, and thus implicated New York's sovereignty. *See id; cf. Perrin v. Pearlstein*, 314 F.2d 863, 867 (2d Cir. 1963).

The contrasting modern approach is to recognize that contracts formed between citizens in different states implicate the regulatory interests of both states. Thus, when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract. *See, e.g., General Ceramics Inc. v. Fireman's Fund Ins.* Co., 66 F.3d 647, 656-59 (3d Cir. 1995) (comparing the regulatory interests of New Jersey and Pennsylvania to a contract formed between a New Jersey company and a Pennsylvania company in the course of determining applicable law). *See generally* Joseph W. Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. Rev. 731, 785-802 (1990) (describing the regulatory interests of states in contract disputes between diverse parties).

This notion that the sovereignty of both the state of the offeror and offeree are implicated by contracts entered into by citizens in different states is the key to understanding the territorial scope of the contract between Goldmen and the prospective buyers of Imatec in another state such as New York. A contract between Goldmen in New Jersey and a buyer in New York does not occur "wholly outside" New Jersey, just as it does not occur "wholly outside" New York. Rather, elements of the transaction occur in each state,

and each state has an interest in regulating the aspect of the transaction that occurs within its boundaries.[13]

Accordingly, § 60 simply allows the Bureau to regulate its "half" of the transaction— the offer that occurs *entirely* within the state of New Jersey— and thus its territorial scope is indistiguishable from that in *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S. Ct. 217 (1917), *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559, 37 S.Ct. 224 (1917) and *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227 (1917).

Viewed in this light, Goldmen's view that § 60 violates the dormant commerce clause because it projects its ban into jurisdictions that would allow the transaction is logically flawed and simply proves too much. If New Jersey seeks to block Goldmen's offering but the buyer's state (say, New York) would allow it, one state must prevail. One state can in effect "force its judgment" upon the other. Under New Jersey's Blue Sky law, New Jersey can block the transaction even if New York would permit it.

Goldmen's alternative is no better, however: under its view of the dormant commerce clause, New York's approval would permit the transaction, over New Jersey's objection. Thus, the difference between New Jersey's Blue Sky law and Goldmen's proposal is simply the market's default rule: should the transaction be allowed if either state permits, or blocked if either side objects? Such questions of the market's "structure" and its "method of operation" are quite simply beyond the concern of the Commerce Clause, as they "relate to the wisdom of the statute, not to its burden on commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978).

C. Legitimate Interests

Having concluded that § 60 regulates the in-state component of an interstate transaction, we next consider whether the statute reasonably furthers a "legitimate interest" within the boundaries of New Jersey. *MITE Corp.*,

13. A discussion of New Jersey's interests in this transaction appears in subsection C.

457 U.S. at 644, 102 S. Ct. at 2641; *CTS Corp.*, 481 U.S. at 93, 107 S. Ct. at 1651-52.

Goldmen claims that New Jersey has no legitimate interest in regulating Goldmen's non-fraudulent sales to out-of-state residents. If Goldmen's business practices are manipulative, Goldmen argues, the harm will be suffered entirely by out-of-state consumers. Br. at 29. Because the protection of out-of-state consumers from potentially manipulative sales practices is not New Jersey's legitimate concern, Goldmen contends, its regulation of Goldmen's non-fraudulent sales to out-of-state consumers does not implicate any legitimate regulatory interests within the state of New Jersey.

The Bureau responds by arguing that its regulation of in-state sales of securities to out-of-state purchasers furthers important New Jersey interests. We agree. In particular, we consider two legitimate state interests to be particularly strong ones. First, preventing New Jersey companies from offering suspect securities to out-of-state buyers helps preserve the reputation of New Jersey's legitimate securities issuers. States that have failed to monitor out-of-state sales by in-state broker-dealers have suffered in the past, as their legitimate broker-dealers suffered from association with suspect firms offering questionable securities. *See* Long, § 3.04[3][a] at 3-51 to 3-52 (providing examples); *see also Stevens v. Wrigley Pharma. Co.*, 154 A. 403, 403 (N.J. Ch. Div. 1931) (noting that New Jersey's interest in regulating in-state offers to out-of-state buyers is "not so much to protect the citizens of other states, as to prevent this state from being used as a base of operations for crooks marauding outside the state."); *Simms Inv. Co. v. E.F. Hutton & Co.*, 699 F. Supp. 543, 545 (M.D.N.C. 1988) ("[T]he laws protect legitimate resident issuers by exposing illegitimate resident issuers."). Although the state interest is heightened when the state can prove that an in-state firm has engaged in outright fraud, the interest is nonetheless legitimate when the state seeks to block sales of securities that it believes might be associated with dubious or manipulative sales practices. The difference between a state's (i.e., New Jersey's) interest in preventing fraud and preventing questionable practices is a difference in degree, not a difference in kind.

The dissent contends that absent proof of actual fraud, New Jersey has an insufficient interest in regulating securities dealers who sell to out-of-state buyers. It is undisputed that the purpose of securities registration laws is to prevent fraud before it happens, and § 60 serves such a prophylactic purpose. *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 587 (1917);[14] *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559, 564 (1917) (upholding Blue Sky Law designed "to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the state"); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 551 (1917) (upholding Blue Sky Law designed to "prevent deception and save credulity and ignorance from imposition"); *Cola v. Terzano*, 322 A.2d 195, 198 (N.J. Super. Ct. Law Div. 1974) (providing that the New Jersey Uniform Securities Law is intended to protect the uninitiated and to prevent frauds upon the public at large), *aff'd sub nom. Cola v. Packer*, 383 A.2d 460 (N.J. Super. Ct. App. Div. 1974); *New Jersey v. Russell*, 291 A.2d 583, 587 (N.J. Super. Ct. App. Div. 1972) (recognizing that the sale of securities is a specialized field of activity in which the potential for abuse and financial injury is great); *Enntex Oil & Gas Co. (of Nevada) v. Texas*, 560 S.W.2d 494 (Tex. Civ. App. 1977, writ ref'd n.r.e.), *appeal dismissed for want of a substantial federal question*, 439 U.S. 961 (1978). New Jersey's regulation of sales by in-state brokers to out-of-state buyers serves the legitimate purpose of preventing fraudulent transactions.

Regulating in-state offers to out-of-state buyers also serves New Jersey interests by protecting New Jersey residents from dubious securities that enter the state in the secondary market. This risk is particularly great because a

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14. [W]e think the [securities registration] statute under review is within the power of the state. *It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done.* This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its function.

Id. at 587 (emphasis added).

broker-dealer such as Goldmen could otherwise delay or even avoid the Bureau's scrutiny through an initial sale to a cooperative party outside New Jersey. Because there is no filing requirement for secondary transactions, Goldmen could arrange to "sell" a security to a friendly out-of-state party, immediately buy back the security, and then sell it freely to New Jersey residents using possibly questionable sales practices. App. 77-78.[15] New Jersey's most effective means of preventing such an undesirable result would be to block the initial public offering. *See* Long, § 3.04[3][b-c] at 3-52 to 3-53.

In conclusion, the Bureau's application of § 60 to Goldmen's Imatec offering furthers two legitimate state interests: preserving the reputation of New Jersey broker-dealers, and protecting New Jersey buyers in the secondary market.

IV.

Because the Bureau's application of § 60 regulates the in-state portion of an interstate transaction and furthers legitimate in-state interests, the application of § 60 to regulate the Imatec offering does not violate the dormant commerce clause. In so holding, we note that our conclusion is in accordance with the overwhelming majority of courts that have considered dormant commerce clause challenges to blue sky laws. *See, e.g., Hall*, 242 U.S. at 557; *Enntex Oil & Gas Co. v. Texas*, 560 S.W.2d 494 (Tex. Ct. App. 1977), *appeal dismissed for lack of a substantial federal question*, 439 U.S. 961 (1978); *Chrysler Capital Corp. v. Century Power Corp.*, 800 F. Supp. 1189, 1194 (S.D.N.Y. 1992); *Upton v. Trinidad Petroleum Corp.*, 468 F. Supp. 330, 336 (N.D.Ala. 1979), *aff'd on other grounds*, 652 F.2d 424 (5th Cir. 1981); *Oil Resources v. Florida*, 583 F. Supp. 1027 (S.D.Fla. 1984), *aff'd without op.*, 746 F.2d 814 (11th Cir. 1984); *see also* Loss & Seligman at 39-40 ("On the whole, it seems fair to say that there no longer need be

15. Notably, there is evidence in the record that Goldmen had engaged in such practices before. App. 196-98.

any substantial constitutional doubts about blue sky provisions.").[16]

Indeed, the established heritage and near universality of the provision that Goldmen has challenged itself underscores its constitutionality. *See Healy*, 491 U.S. at 336-37, 109 S. Ct. at 2499. Goldmen has challenged a state provision that is an established strand in the legal fabric of securities regulation. The power that Goldmen claims would unduly burden interstate commerce is one that most states have long exercised, and that Congress has for decades expressly allowed to continue. This is not the sort of "parochial" state power that Justice Cardozo warned of in *Baldwin*, the broad exercise of which "would . . . invite a speedy end of our national solidarity." *Baldwin*, 294 U.S. at 523, 55 S.Ct. at 500.

We will therefore reverse the order of the district court dated August 21, 1997, and remand for proceedings consistent with this opinion.

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16. Goldmen relies heavily on *Arizona Corp. Comm'n v. Media Products, Inc.*, 158 Ariz. 463, 763 P.2d 527 (Ariz. App. 1988), the one case that runs counter to the many upholding state blue sky laws against dormant commerce clause challenges. *Media Products* is distinguishable, however, because in that case Arizona sought to bar an Arizona company from selling a security outside of Arizona through an agent outside of Arizona to a buyer who was also outside of Arizona. In other words, the only connection the transaction had with Arizona was that the principal place of business of the seller was located there. *See id.* at 464-65; 763 P.2d at 528-29. ("Sales of the entire issue were negotiated out-of-state[,] solely by [an] out-of-state underwriter . . . . No sales or offers of sale were made in Arizona."). Because the offer and acceptance took place entirely *outside* of Arizona, Arizona's attempt to block the transaction was not an effort to regulate the *in-state* component of an interstate transaction, as is the case here.

McKEE, *Circuit Judge*, dissenting.

I respectfully dissent from the opinion of my colleagues. The majority recognizes New Jersey's right to regulate that portion of a multi-state transaction occurring within its borders because "one state must prevail" in a dispute that extends beyond its borders and involves residents of other states. Maj. Op. at 16. The approach the majority uses would be helpful to resolving a choice of law dispute, but it is of only limited assistance in adjudicating this dispute under the Commerce Clause. New Jersey does not allege that Goldmen's sale of Imatec stock involved fraud, and the district court concluded that fraud was not involved. *See* Dist. Ct. Op. at 7 ("The Bureau does not advance a single allegation of fraud"). Thus, the issue is not which state will win, but whether New Jersey's interest here is sufficient to allow it to prevent Goldmen from soliciting residents of other states. The district court concluded, "the Bureau is reaching out to prohibit a sale, not made to New Jersey residents, which takes place in a national securities market, and which is regulated by each state to protect its own citizens." *Id.* The district court concluded that New Jersey's interest was not sufficient to allow that result. I agree, and would affirm the well reasoned decision of the district court.

I.

My colleagues cite *General Ceramics Inc. v. Firemen's Fund Ins. Co.*, 66 F.3d 647, 656-59 (3rd Cir.) to justify the conclusion that New Jersey's interest in regulating offers made from within its borders justifies preventing Goldmen from offering shares of Imatec to buyers residing in states where that security is properly registered. Maj. Op. at 15.

In *Firemen's Fund*, the issue was

> whether New Jersey or Pennsylvania law controls the interpretation of an exception to a pollution-exclusion clause when New Jersey has significant contacts with the insurance contract and the insured but Pennsylvania is the site of the hazardous waste site giving rise to the liability for which coverage is sought.

Id., at 649. The dispute arose in a diversity case where we applied New Jersey's choice of law rules to determine if the law of New Jersey or Pennsylvania governed the interpretation of an exception to a pollution-exclusion clause in a comprehensive liability insurance policy. The loss that gave rise to the dispute resulted from costs incurred under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). Our analysis focused upon which state's law controlled "whether the phrase 'sudden and accidental' extended coverage for the gradual discharge of pollution." *Id.*, at 652. We held that New Jersey law applied. *Id.* ("Based on the strong public policy that underlies New Jersey's broad interpretation of the pollution-exclusion exception, . . . New Jersey law governs."). We reached that result because the interests of Pennsylvania would not have been furthered by applying its law to that particular dispute, whereas the interests of New Jersey were furthered by applying the law of New Jersey. *Id.*, at 657.

That does not assist us here. The controversy here is not merely between the conflicting regulations of two or more states. Rather, this dispute focuses upon the impact of that conflict upon interstate commerce. Nor, do I believe that the *Blue Sky Cases*[1] support the majority's conclusion. Although those cases do address the scope of the restrictions imposed on states under the Commerce Clause, they do not address the precise issue that Goldmen raises. In *Merrick*, (one of the *Blue Sky Cases*) the Court did not even address whether the Blue Sky Law at issue violated the Commerce Clause. Instead, the Court reserved that question for decision in *Geiger-Jones v. Hall* - a companion case to *Merrick*. *See Merrick*, 242 U.S. at 590. In *Hall*, the Court reviewed an Ohio law that required sellers of securities to obtain a license before offering any securities for sale within the state. An Ohio securities broker with clients in several states including Ohio (Geiger-Jones) brought a multi-faceted challenge to the legality of Ohio's licensing requirement. The primary assertion was that

1. *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217 (1917). *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559, 37 S.Ct. 224 (1917) and *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227 (1917).

Ohio's licensing requirement was an improper exercise of the state's police power. 242 U.S. at 548. The Court concluded that the requirement was a valid means of protecting against fraud, and noted that the Commissioner's ability to deny or revoke a license was qualified by a duty of good faith, and subject to judicial review. *Id.*, at 553. The Court reasoned:

> The provisions . . . apply to dispositions . . . within the state, and while information of those issued in other states . . . is required to be filed, they are only affected by the requirement of a license of one who deals in them within the state. Upon their transportation into the state there is no impediment, — no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character . . . and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. *It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state.* Such regulations affect interstate commerce in them only incidentally.

242 U.S. at 557-8 (emphasis added). Here, the regulation in question has a far greater impact upon commerce outside of the state. It prevents solicitation of residents of other states and thereby has the practical effect of halting sales to individual purchasers unless those purchasers know of the securities and make Goldmen an unsolicited offer to buy. In fact, the Bureau's entire justification for § 60 rests upon its admitted desire to stop such solicitations, and thereby stop solicited sales. Therefore, it is as misleading as it is inaccurate to conclude that the extraterritorial affect of § 60 is "incidental" and to uphold the prohibition as a regulation of New Jersey's "half" of an interstate transaction. *See* Maj. Op. at 16. Themajority states:

> If New Jersey seeks to block Goldmen's offering but the buyer's state (say, New York) would allow it, one state must prevail. One state can in effect "force its judgment" upon the other. . . . block the transaction even if New York would permit it.

> Goldmen's alternative is no better, however: under its view of the dormant commerce clause, New York's approval would permit the transaction, over New Jersey's objection. Thus, the difference between New Jersey's Blue Sky law and Goldmen's proposal is simply the market's default rule: should the transaction be allowed if either state permits, or blocked if either side objects? Such questions of the market's "structure" and its "method of operation" are quite simply beyond the concern of the Commerce Clause, as they "relate to the wisdom of the statute, not to its burden on commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978).

Maj. Op. at 16. However, applying § 60 to bar solicitation where a security could otherwise be sold goes to the very heart of the Commerce Clause. The question is not which state's regulations will prevail, but whether either state has an interest of sufficient gravity to allow it to enforce its regulations in a manner that so effects interstate commerce. The majority's analysis focuses only upon the interest of the inconsistent regulatory schemes in the relevant "competing" states. That approach fails to afford proper recognition of the overriding federal interest that must control under a Commerce Clause analysis. *See Kassell et al. v. Consolidated Freightways Corp.* 450 U.S. 662 (1981).

In *Kassell*, an interstate trucking company sought to strike down an Iowa law that limited the size of trucks on interstate highways in Iowa to 50 feet. Consolidated Freightways sought to invalidate the restriction arguing it burdened interstate commerce. Neighboring states, and nearly all other states in the west, and midwest allowed trucks up to 65 feet in length on the portion of interstate highways within their borders. Accordingly, interstate trucking companies had to either use shorter trucks to transport cargo through the midwest, route cargo around Iowa, or switch trailers at the Iowa border in order to insure that they did not exceed Iowa's length restriction. The Court concluded that Iowa's proffered justification of safety was tenuous at best because the record did not establish that reducing trailer size had as direct an impact on the safety of an interstate highway as Iowa claimed.

> Regulations designed for [safety] nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. . . . In [*Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, (1978)] we declined to accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce. 434 U.S., at 443, 98 S.Ct., at 795. This "weighing" by a court requires— and indeed the constitutionality of the state regulation depends on— a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.

Id. at 670 (internal quotation marks omitted).

Although it appears at first that *Kassell* can easily be distinguished from the facts before us, I believe the ease with which *Kassell* can be dismissed is somewhat illusory. The distinction stems from the tangible nature of the commerce involved in *Kassell* rather than the quality of its relationship to interstate commerce. The impact of a regulation upon trucks moving on interstate highways is readily apparent. The impact of § 60 upon commerce outside of New Jersey is intangible, but nevertheless real. New Jersey's interest here is not prevention of fraud because fraud is not alleged. Thus, I disagree with the weight the majority attaches to New Jersey's claimed interest in protecting the reputation of securities dealers that sell from offices in New Jersey. Maj. Op. at 17. New Jersey's attempt to preserve § 60 by pointing to its legitimate interest in preventing fraud is not unlike Iowa's attempt to preserve its regulation by arguing that it furthered the safety of its interstate highways in *Kassell*. That argument was not supported by the record there, and the fraud argument is not supported by the record here. New Jersey can not prevent the sale of a security in a state where the sale is proper merely by alleging a concern for the speculative nature of Imatec, and alleging concerns regarding Goldmen's business practices. If Goldmen (or any other broker) engages in misleading and improper business

practices in the sale of Imatec stock (or any other stock or commodity for that matter) New Jersey can certainly investigate and remedy the situation under its police powers. *See Merrick, supra.* The Bureau can prohibit fraud in the offer, sale and purchase of securities, N.J.S.A. 49:3-52; it can prohibit misleading filings, N.J.S.A. 49:3-54; it can prohibit unlawful representations concerning registration, N.J.S.A. 49:3-55; it can conduct investigations, subpoena witnesses and require the production of evidence, N.J.S.A. 49:3-68; and it can enjoin illegal conduct, N.J.S.A. 49:3-69.

Accordingly, the majority's citation to *Stevens v. Wrigley Pharma. Co.*, 154 A. 403, 403 (N.J. Ch. Div. 1931) (noting that New Jersey's interest in regulating in-state offers to out-of-state buyers is "not so much to protect the citizens of other states, as to prevent this state from being used as a base of operations for crooks marauding outside the state."), and *Simms Inv. Co. v. E.F. Hutton & Co.*, 699 F. Supp. 543, 545 (M.D.N.C. 1988) ("[T]he laws protect legitimate resident issuers by exposing illegitimate resident issuers."), is misplaced. *See* Maj. Op. at 17. If that is New Jersey's interest here, let the Bureau allege and prove fraud. We are far too quick to allow New Jersey to proceed as though it had established a fraud it is not even alleging. We ought not rest our decision here upon concerns that arise from insinuations and implications about unproven, and unalleged, conduct on the part of Goldmen.

The majority also relies upon New Jersey's ability to regulate "in-state offers to out-of-state buyers" stating that such an interest "also serves New Jersey interests by protecting New Jersey residents from dubious securities that enter the state in the secondary market." Maj. Op. at 18. Yet, § 60 does not do that. Goldmen can solicit sales of Imatec shares to institutional buyers, and other broker-dealers no matter where they are located. Similarly, he can sell these shares to individuals in New Jersey and elsewhere so long as he does not solicit the buyer. Once any such sales occur, the shares are in the secondary market and Goldmen is no longer restrained by § 60.[2]

2. The Bureau takes the position that individuals who make an unsolicited offer to buy from Goldmen, and institutional buyers and

II.

The Supreme Court "has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court] has generally struck down the statute without further inquiry." *Id.* at 579. "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the Court] has examined whether the State's interest is legitimate and whether the burden on interest commerce clearly exceeds the local benefits." *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Although I believe a strong case can be made that § 60 falls within the first tier of inquiry and therefore could be struck down as a *per se* violation of the Commerce Clause, I think our inquiry should, more appropriately, be conducted under the *Pike* balancing test that guides inquiry under the second tier.[3]

Although the majority does not directly refer to *Pike v. Bruce Church*, it is obvious that, by discussing New Jersey's

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other broker-dealers are better informed. The Bureau reasons that extremely risky securities will, therefore, not enter New Jersey via the secondary market as they won't be sold in the first place. However, these better informed buyers may well purchase shares of even the riskiest stock based upon a belief that the risk is offset by the selling price, and the potential for greater profit. For a discussion of the various theories of how risk, information about an issuer, and potential profit are factored into the selling price of shares of stock, see Robert G. Newkirk, Comment, *Sufficient Efficiency: Fraud on the Market in the Initial Public Offering*, 58 U. Chi. L. Rev. 1393 (1991).

3. The Supreme Court has "recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. at 578-79. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

local interests, it is engaging in a balancing of interests as required by *Pike*. In *Pike*, the Court wrote:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the local putative benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

397 U.S. 137, 142 (1970).

Moreover, a state cannot impose its regulatory scheme on another state in an effort to "control conduct beyond the boundaries of the state." *Healy v. Beer Institute*, 491 U.S. 324, 326 (1989). This prohibition against extraterritoriality "reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual states with their respective spheres." *Id.* The Supreme Court has summarized the application of the limitations "inherent" in the Commerce Clause as follows:

> [O]ur cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was

> intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another.

Id. at 336-37 (citations and internal quotations omitted).

I agree that Goldmen's telephone solicitation of out-of-state buyers for shares of Imatec would not be a transaction occurring "wholly outside" of New Jersey. However, the majority's view that the Bureau is only regulating its "half" of a transaction by prohibiting Goldmen from soliciting out-of-state buyers, see Maj. Opn. at 16, is accurate in theory, but not accurate in the jurisprudential reality of the Commerce Clause. Goldmen is not the issuer of these securities. It is only the underwriter. Imatec, a Delaware corporation whose main office is in New York, is the issuer. Imatec's only connection with New Jersey is that its offering was underwritten by a broker-dealer who happens to be located there, and that broker dealer planned to solicit out-of-state sales from its New Jersey office. It may be reasonably assumed that out of state buyers would purchase these shares from funds held in financial institutions outside of New Jersey, and that any profits would be deposited into those same financial institutions. Moreover, the growth and fiscal strength of Imatec, the Delaware corporation, is related to the value of its shares. Thus, New Jersey's only connection with this interstate transaction lies in the fortuitous circumstance that a broker-dealer would be sitting at a desk somewhere in New Jersey making telephone calls to residents of the 16 states where Imatec securities are appropriately registered and authorized for purchase.

Goldmen has satisfied the registration requirements of 16 states and those states allow their residents to be solicited to purchase shares of Imatec. Each of those states could have enacted a regulatory scheme that only allowed the sale of securities properly registered in the state where the seller maintains its principal office. None of the 16 states have chosen to do so. Our holding has the practical effect of reading § 60 into the regulations of each of those states despite the absence of such a restriction in the regulatory schemes of the 16 states. The majority concludes that this result is consistent with the Commerce Clause because it furthers two "particularly strong" local interests, viz., preserving the reputation of New Jersey broker-dealers and protecting New Jersey buyers in the secondary market. Maj. Opn. at 17-19. My colleagues can reach this conclusion by viewing § 60 as having only an "incidental" impact on interstate commerce. As I state above, § 60 imposes an absolute ban on interstate commerce that consists of soliciting individual buyers of Imatec stock from New Jersey. If we analyzed the regulation from the perspective of that absolute ban on the solicited sale of Imatec securities to residents of the states where the securities have been approved for sale, the burden on interstate commerce would be far more substantial than the majority suggests.

However, even assuming *arguendo* that the regulations at issue here have only an "incidental" effect on interstate commerce, New Jersey's interest is still not sufficient to justify prohibiting solicitations in 16 states where these securities are registered. I believe that finding such an interest requires more than the asserted need to protect potential purchasers residing elsewhere from the risks of penny stocks and sellers such as Goldmen. It requires some showing that the interests New Jersey seeks to further would be advanced by applying § 60 to solicitations of Imatec. If the Bureau can establish that Goldmen is engaging in false and misleading sales practices or fraud, New Jersey has an interest sufficient to survive scrutiny under the Commerce Clause. But, the Bureau concedes that "[t]his is not a fraud case." App. at 558. Therefore, I am at a loss to understand how the majority can conclude on the record before us that New Jersey has shown a "particularly strong" interest.

Since New Jersey's interest absent fraudulent business activities is minimal at least, the federal interests are paramount. It is not a question of allowing one state's regulatory scheme to prevail over that of another state. "The balance here must be struck in favor of the federal interests." *Kassell*, 450 U.S. at 667. Accordingly, I believe we should affirm the decision of the district court.

A True Copy:
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Clerk of the United States Court of Appeals
for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

A.S. GOLDMEN & COMPANY, INC., Plaintiff, v. NEW JERSEY BUREAU OF SECURITIES, Defendant.	Civ. No. 96-5280 (DRD) **OPINION**

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DEBEVOISE, Senior District Judge.

This is an action for a declaratory judgment holding, *inter alia*, that the New Jersey Securities Act, N.J.S.A. 49:3-47, *et seq.*, as applied to securities that were not registered or exempt from registration and were sold by brokers located in New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale, violates the Commerce Clause of the United States Constitution. Defendant moves, and plaintiff cross moves, for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, plaintiff's motion is granted and defendant's motion is denied.

BACKGROUND

The underlying facts relevant to the motions for summary judgment are set forth in the bench opinion of November 20, 1996. *See* Affidavit of Brad S. Karp, Exhibit B, at 36-40. Pursuant to an Order entered on that date, the court preliminarily enjoined Defendant New Jersey Bureau of Securities ("Bureau") from taking any action that would prohibit Plaintiff A.S. Goldmen & Co., Inc., and its employees and agents from soliciting, offering, or selling securities that are not registered or exempt from registration in New Jersey to residents of states (other than New Jersey) in which the securities are qualified for sale. Karp Aff., Ex. A.

STANDARD OF REVIEW

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] in entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to

admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986), *rev'g*, 723 F.2d 238 (3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Sound Ship Bldg. Corp.* v. *Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir. 1974), *cert. denied*, 429 U.S. 860 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The mere existence of some alleged factual dispute between the parties, however, will not defeat an otherwise properly supported motion for summary judgment. *Id.* at 247-248.

ANALYSIS

The Commerce Clause, Art. I, § 8, cl. 3, gives Congress the power to regulate commerce among the States. It also "includes an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy* v. *Beer Institute*, 491 U.S. 324, 326 n.1 (1989). This dormant aspect of the Commerce Clause is at issue in this case. The resolution of the motions for summary judgment hinges upon a determination of whether New Jersey has exceeded its authority under the dormant Commerce Clause by seeking to apply Section 60 to a local broker who

sells securities that do not qualify for sale in New Jersey to customers in states where the securities do qualify for sale.

"When conducting a dormant Commerce Clause analysis, [courts] seek to balance the national interest in vibrant interstate commerce with the local interests promoted by the state regulation." *Tolchin* v. *Supreme Court of the State of New Jersey*, 111 F.3d 1099, 1106 (3d Cir. 1997); *see General Motors Corp.* v. *Tracy*, 117 S.Ct. 811, 824 n.12 (1997). In *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), the United States Supreme Court set forth two standards for reviewing state statutes that affect interstate commerce. The Court stated:

> When a state statute directly regulates or discriminates against interstate commerce, or when its affect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without any further inquiry. When, however, a statute only has an indirect effect on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Id. at 579. (citations omitted).

Plaintiff argues that the first standard is the most pertinent here. It contends that the Bureau's application of N.J.S.A. 49:3-60 ("Section 60") constitutes a direct burden on interstate commerce because it seeks to regulate the ability of out-of-state residents to purchase securities approved by their home state's securities regulators. The Bureau, on the other hand, contends that its application of Section 60 does not impose any such direct burden, within the meaning of the Commerce Clause, because it does not attempt to regulate

commerce occurring "wholly outside of New Jersey." The Bureau notes, for example, that its application of Section 60 does not prevent plaintiff from selling Imatec securities from offices located outside of New Jersey to customers located outside of New Jersey, and it does not prevent persons in other states from purchasing IMATEC securities from plaintiff. Plaintiff is only prevented from soliciting such persons.

In considering whether a state statute "directly regulates" commerce the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy* v. *The Beer Institute*, 491 U.S. 324, 336 (1989)); *see also Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573, 582 (1986) (requiring an individual "to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce"); *Instructional Systems, Inc.* v. *Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994). The Supreme Court has consistently struck down on Commerce Clause grounds state statutes that apply one state's standards to another state's residents. *See, e.g., Brown-Forman Distillers Corp.* 476 U.S. at 583-84; *Edgar* v. *Mite Corp.*, 457 U.S. 624, 640-44 (1982); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 677 (1981); *Old Bridge Chemicals, Inc.* v. *New Jersey Department of Environmental Protection*, 965 F.2d 1287, 1293 (3d Cir. 1992). Indeed, the Supreme Court made manifest in *CTS Corp* v. *Dynamics Corp. of America*, 481 U.S. 69 (1987), that "the Commerce Clause protects against inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another." *Id.* at 88-89.

In the instant case, by way of its application of Section 60, the Bureau effectively seeks to impose New Jersey securities regulations onto other states. The sales which

the Bureau purports to regulate are those of a security which has been registered with the SEC, approved by NASDAQ, and approved by each of the other states in which the securities are to be sold. To allow the Bureau to preclude consumers in other states from receiving solicitations to purchase securities which their own state regulators have deemed appropriate for purchase is, in essence, to allow the Bureau to substitute its own regulatory judgment for that of other states. The Supreme Court has made clear that such an application of state law constitutes a direct burden on interstate commerce. *See e.g.*, *CTS Corporation*, 481 U.S. at 88-89; *Brown-Forman Distillers Corp.*, 476 U.S. at 583-84.

Even if it is assumed that the Bureau's application of Section 60 does not directly burden interstate commerce, the statute still violates the dormant Commerce Clause because the burden it imposes on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike* v. *Brice Church, Inc.*, 397 U.S. 137 (1970). The Bureau asserts that New Jersey's interests are in protecting its commercial reputation from fraud and in protecting in-state consumers from securities fraud. Although both of these interests are legitimate, New Jersey's interest in this particular application of Section 60 is insubstantial. The Bureau does not advance a single allegation of fraud against plaintiff. Moreover, the Bureau is reaching out to prohibit a sale, which will not be made to New Jersey residents, which takes place in a national securities market, and which in regulated by each state to protect its own citizens.

In addition, there are less intrusive measures available to the Bureau to accomplish its goals. The Court in *Pike* held that:

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the

> burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted with a lesser impact on interstate activities.

Pike, 397 U.S. at 142. Here, if the Bureau wishes to monitor the sale of securities to New Jersey residents in the secondary market, the Bureau can take several measures short of prohibiting the solicitation of residents of states in which they are qualified for sale. For example, the Bureau could require local brokers that intend to sell securities from Now Jersey to residents of states other than Now Jersey to inform the Bureau of such sales. The Bureau also has the ability to monitor the sale of securities to residents of New Jersey in the secondary market pursuant to its authority as a state regulatory and investigating agency. The Bureau can subpoena witnesses, demand and inspect records, and utilize the arsenal of other investigative tools at its disposal. In short, because the burden it imposes on interstate commerce clearly exceeds the benefits to New Jersey, the Bureau's application of Section 60 of the New Jersey Uniform Securities Law to the sale of Imatec securities violates the Commerce Clause.

CONCLUSION

For the foregoing reasons, plaintiff's cross motion for summary judgment is granted, and defendant's motion for summary judgment is denied. An appropriate order follows.

/s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.S.D.J.

Dated: August 21, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

A.S. GOLDMEN & COMPANY, INC., Plaintiff, v. NEW JERSEY BUREAU OF SECURITIES, Defendant.	Civ. No. 96-5280 (DRD) **ORDER**

This matter having been opened to the Court by Peter Verniero, Attorney General of New Jersey, and Joshua T. Rabinowitz, Deputy Attorney General of New Jersey, attorneys for the defendant, on a motion for summary judgment, and by Martin Flumenbaum, Esq., and Brad S. Karp, Esq., attorneys for the plaintiff, on a cross motion for summary judgment, notice having been given to all parties, in consideration of the papers submitted, for good cause shown, and for the reasons set forth in the Court's opinion of even date,

IT IS, on this 21st day of August 1997,

ORDERED as follows:

1. Defendant's motion for summary judgment is DENIED.

2. Plaintiff's cross motion for summary judgment is GRANTED.

3. It is adjudged and declared that absent allegations of fraud, application of the New Jersey Securities Act, N.J.S.A. 49:3-47, *et seq.*, to prohibit out-of-state solicitations from offices in New Jersey of Imatec, Ltd., securities that were not registered or exempt from registration in New Jersey when such securities are qualified for sale in the states in which the solicitations are made, violates the Commerce Clause of the United States Constitution.

/s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.S.D.J.

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-and-

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Attorneys for Plaintiff A.S. Goldmen & Co., Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

A.S. GOLDMEN & COMPANY, INC., Plaintiff, v. NEW JERSEY BUREAU OF SECURITIES, Defendant.	Civ. No. 96-5280 (DRD) **ORDER TO SHOW CAUSE**

Upon the complaint herein; the affidavit of Foster Gibbons, sworn to on November 13, 1996; the affidavit of

Jay K. Musoff, sworn to November 13, 1996; the accompanying memorandum of law; and all other pleadings and papers filed in this action, it is hereby:

ORDERED that defendant show cause at a hearing to be held in this Court before the Honorable Dickinson R. Debevoise, United States District Judge, in courtroom 5B of the United States Courthouse, 50 Walnut Street, Newark, New Jersey, on November 20, 1996, at 8:15 a.m., or as soon thereafter as counsel may be heard, why an order should not be granted declaring that:

(i) the New Jersey Securities Act, as applied to securities that were not registered or exempt from registration in New Jersey and were sold by brokers located in New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale, violates the Commerce Clause of the United States Constitution;

(ii) the New Jersey Securities Act does not apply to securities that were not registered or exempt from registration in New Jersey and were sold by brokers located in New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale; and it is

FURTHER ORDERED that, pending full consideration of this matter, any action by the New Jersey Securities Bureau that prohibits A.S. Goldmen and its employees and agents from the solicitation, offer and sale of Imatec Securities to or from persons residing outside of New Jersey is stayed; and it is

FURTHER ORDERED that any papers in opposition to plaintiff's application for the above relief be served on plaintiff's counsel by hand delivery no later than noon on November 19, 1996, and that any reply papers in further

support of plaintiff's motion by served on defendant's counsel by hand no later than 8:00 a.m. on November 20, 1996.

Dated: Newark, New Jersey
November 14, 1996

/s/ Dickinson R. Debevoise
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE-DISTRICT OF NEW JERSEY
Civil No. 96-5280

A.S. GOLDMEN & COMPANY, INC.,	:	
Plaintiff,	:	
v.	:	TRANSCRIPT OF PROCEEDINGS
NEW JERSEY BUREAU OF SECURITIES,	:	
Defendant.	:	

Newark, New Jersey
November 20, 1996

B E F O R E: HONORABLE DICKINSON R. DEBEVOISE,
SENIOR UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

SAUL, EWING, REMICK & SAUL,
BY: MICHAEL A. LAMPERT,
CARL E. AILARA, JR.,
and
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
BY: MARTIN FLUMENBAUM,
BRAD S. KARP,
Attorneys for the Plaintiff

PETER VENIERO, Attorney General of New Jersey
BY: JOSHUA T. RABINOWITZ,
TRACEY THAYER, Deputies Attorney General
For the State of New Jersey

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

HOWARD A. RAPPAPORT
Official Court Reporter

THE COURT: Good morning.

I have the original affidavits from the plaintiff.

Have they been filed, or shall I file these with the original papers I got from the state? Have these gone to the clerk's office yet?

MR. RABINOWITZ: No. I delivered two copies as directed to your chambers in Newark yesterday.

THE COURT: All right. Let me — I'm going to add those to the affidavits of Miss Thayer, Mr. Lane and Mr. Barry, I think I have the originals of those and I have the original of yours, and we'll file all of them in the clerk's office. They will be part of the full record.

Could I have the appearances again? For the plaintiff?

MR. FLUMENBAUM: For the plaintiffs, Martin Flumenbaum and my partner Brad Karp, Paul, Weiss, Rifkind, Wharton and Garrison.

MR. LAMPERT: And Michael Lampert from Saul, Ewing, Remick and Saul.

MS. THAYER: Tracey Thayer, Deputy Attorney General, and with me today is Joshua Rabinowitz, also a Deputy Attorney General.

THE COURT: All right.

I've read all the papers. So what would you wish to add?

MR. FLUMENBAUM: Your Honor, just so that the record is clear, we served this morning a copy of a reply brief and two additional affidavits, one from Marlene Reed of Orick, Herrington and one from Dr. Hanoch Shalit, who is the chief executive officer of Imatec.

THE COURT: Yes, I've received those through a fax, and I guess the state received its copy.

Mr. Flumenbaum, go ahead.

MR. FLUMENBAUM: Your Honor, on Tuesday, November 12th at nine o'clock in the morning A.S. Goldmen commenced suit in this court seeking a declaration that it was lawful for A.S. Goldmen to sell Imatec securities to customers outside of New Jersey in states which have specifically approved Imatec's stock for sale.

The day after we filed the suit, and that suit sought in specific an expedited hearing before your Honor, the bureau chief of the New Jersey Bureau of Securities issued an ex parte cease and desist order without notice.

THE COURT: He issued it the day before and it was served —

MR. FLUMENBAUM: Right. We didn't know until the next day, the 13th. — prohibiting Goldmen from soliciting customers outside New Jersey for sale of Imatec securities.

As you know, last Thursday we were before you and your Honor entered an order maintaining the status quo, thus avoiding what we maintain is serious and irreparable injury to not only A.S. Goldmen, but also Imatec and thousands of shareholders of Imatec.

We believe the issue before the Court is fairly straightforward and does not require the Court to do any substantial interference or disruption of New Jersey's regulation of securities.

The issue is, can the New Jersey securities bureau prevent Goldmen from selling in a nonfraudulent manner a security which has been registered with the SEC, approved by NASDAQ, to customers in other states which have specifically approved those securities for sale in that state?

We respectfully submit that New Jersey's ban on such transactions directly burdens interstate commerce and violates the commerce clause. It projects New Jersey regulatory scheme into that of other states.

I think it's significant that in the entire brief submitted by the New Jersey securities board they have not cited a single case, either in New Jersey or elsewhere, where the position taken by New Jersey has been upheld in a nationally traded security.

Let me first address the attempt by the securities bureau to urge this Court to abstain. We believe that the Younger abstention, which is the only ground urged upon your Honor, does not apply at all in this case. None of the requirements for the Younger abstention are met.

First, there was no pending state judicial proceeding or even administrative proceeding at the time we commenced this litigation.

THE COURT: Well, who is — under the New Jersey procedure, who is the first hearing officer or agency in the litigation process?

MR. FLUMENBAUM: Well, the Bureau of Securities had the option under, I believe, Section 369, to go into a court with notice and seek an order similar to the one that was issued.

THE COURT: Had it done that, then Younger abstention might well be applicable?

MR. FLUMENBAUM: Absolutely correct. They waited until after we filed suit here, and then the agency chief, under 367 of the New Jersey statutes, issued a cease and desist order by himself. And the procedure for us to challenge that at this point would be to go back to him to ask him to stay his own order, not the kind of procedure that one would expect to use in terms of constitutional challenges to the authority of the agency which is issuing the order and is in charge of the interpretation of the statute we are in fact challenging here today.

THE COURT: In its brief the state, as I recall it, referred to either a statutory or regulatory provision which permitted it, or which would have permitted you to obtain immediate relief.

MR. FLUMENBAUM: You have to first go to the agency chief himself. There is no provision, as I can read it, as I read the statute, and Mr. Lampert has confirmed that for me in terms of the intricacies of New Jersey administrative law that sets a specific time for that bureau chief to determine the issue or to issue the stay. You cannot go to a court until after the agency has first ruled.

In any event, we were before this Court already seeking an expedited hearing. There was no need to issue that cease and desist order. The New Jersey authorities could have come right before your Honor on the very issue which was

already before your Honor, or they could have gone into court in New Jersey.

What they are trying to do is sort of the reverse of Younger, which is to take a state administrative ex parte order and try to divest this Court of jurisdiction on a purely constitutional issue which this Court clearly has the authority and right and obligation, I submit, to decide.

The second Younger point obviously is that the state proceedings must implicate important state interests.

THE COURT: It can't be questioned the regulation of securities is an important state issue.

MR. FLUMENBAUM: We don't disagree with that, your Honor. But the issue before your Honor is really one of greater federal interest than it is of greater state interest.

We are not here dealing with the regulation of fraud within the state. We are dealing here with the federal interest, promoting uniformity of sales, uniformity of registration, and I respectfully submit that in this case the federal interest is far more important.

If you look at the O'Neal case which the bureau relies on, you are dealing with a Philadelphia parking regulatory system. The Court said in that case where they upheld the Younger abstention, the federal court really had no interest in that proceeding. The state court had a much greater interest.

I think in this case it is the reverse. The federal court has the greater interest in making sure about — that New Jersey regulations don't burden interstate commerce.

The third issue is the state proceedings must afford an adequate opportunity to raise the constitutional issues.

I've already alluded to that. We believe that the procedures which require us to go back to the agency at a time when irreparable harm is clear and can't be avoided is a circumstance that prevents an adequate remedy within the state administrative system.

For those three reasons I think Younger doesn't apply, but even, your Honor, if Younger did apply, if all those factors were, there is an exception to Younger which the courts are very clear about, I believe your Honor has written about that himself, that even if all those elements are satisfied, abstention is not appropriate where the federal claimants make a showing of some extraordinary circumstance such as irreparable harm, such as the policies of the new federal securities statute which we believe plays a very important role in this proceeding and, unbelievably, it's not even mentioned by the state.

THE COURT: You didn't mention it in your opening brief either.

MR. FLUMENBAUM: We did discuss it during our argument last week, your Honor. We had — we put that brief together very quickly, as you know, because the cease and desist order was served that morning and we came in to you, you know, that afternoon. We did discuss that statute last Thursday, and we indicated last Thursday during oral argument that we intended to rely on that, and we feel —

THE COURT: What is your position with respect to that statute? That after the time period has gone by, three or four days from now, then everything is moot?

MR. FLUMENBAUM: Well, I think everything is moot, that's with respect to the sale of — to nonresidents outside of New Jersey, but I think it is — the statute has an importance beyond that. It shows where the policy considerations are. It shows where the balance is. It shows what the real interest that the state is setting forth what the real value of those interests are.

What that statute shows is that the federal interest is preeminent here, not the state interest, much like the old Discounts case where the Court said we are not going to exercise the Younger abstention because of the federal policy in favor of arbitration. I think that that statute gives your Honor another reason not to exercise Younger abstention in this case.

Obviously the issue of irreparable harm, on which I think we made an overwhelming showing what the impact of this order would be on, on Goldmen, on Imatec, the affidavit of Dr. Shalit's talks about how this young company, which has just begun trading, would — could be destroyed by this cease and desist order.

THE COURT: Let me clarify what actually happened.

There has been — the original issue is all out. That was sold out within a matter of days.

MR. FLUMENBAUM: Within one day, your Honor.

THE COURT: Now it is simply dealing in the secondary market.

MR. FLUMENBAUM: Correct.

THE COURT: In this market do you still just offer securities to persons outside of New Jersey in states where you're registered?

MR. FLUMENBAUM: Yes. As of now we are soliciting sales only in those states, only to nonresidents at this point.

After November 23 we will be able to solicit sales within New Jersey under the new National Securities Act.

THE COURT: Notwithstanding that other people will be offering these same securities in New Jersey. The purchasers of the original issues, there is nothing to bar them from —

MR. FLUMENBAUM: There are several other market makers. Goldmen happens to be the principal market maker in this security right now. Its inability to transact business, even for a day, would impact this stock.

THE COURT: You say there are other market makers?

MR. FLUMENBAUM: There are other market makers, but Goldmen is the principal market maker.

THE COURT: If you were knocked out, why would the other market makers takeover have any impact on the company?

MR. FLUMENBAUM: In the NASDAQ small market it's not quite so easy. Goldmen was the underwriter. It is the most knowledgeable. It is the entity to which the other dealers look to do the transactions, and it is the principal person soliciting and making the markets in the securities.

THE COURT: Wouldn't New Jersey have an interest in the secondary market where the market maker may not be implicated in the sale? Other people are selling securities back and forth to New Jersey residents as well as to residents of other states?

MR. FLUMENBAUM: I do not believe there is any indication that these securities are being sold improperly to New Jersey residents.

THE COURT: It's not improperly. They are being sold. New Jersey residents will be purchasing these securities.

MR. FLUMENBAUM: Not during this period, it is my understanding.

THE COURT: Why not?

MR. FLUMENBAUM: Because I think the other people, the other broker/dealers who are selling Imatec securities cannot sell in New Jersey because it is not registered in New Jersey.

THE COURT: Yes, but people who buy the securities, they may effect sales into people in New Jersey.

MR. FLUMENBAUM: Not on the NASDAQ market. It wouldn't work that way.

THE COURT: There would be no —

MR. FLUMENBAUM: You're hypothesizing a private sale between, and that's just highly unusual —

THE COURT: Might there not be brokers who were well, other brokers, why wouldn't they come into possession of these securities and sell them to a New Jersey resident?

MR. FLUMENBAUM: I believe they wouldn't be permitted since the stock is not registered in New Jersey.

That could happen today from — that could happen today from brokers outside of New Jersey who could try to sell to New Jersey residents. I believe the New Jersey securities bureau would take the position that is improper and then the attack those brokers.

THE COURT: How would they know about it? Some broker firm in San Francisco acquires these securities, or a customer of theirs may have acquired the securities, they sell them, what would — how would they know that there is an order?

MR. FLUMENBAUM: They would find out about that in the way they find out about other areas of violation, through informants, through complaints from customers, through their monitoring of securities, through their interaction with other states.

I think your Honor's concern doesn't relate to the specific issue here because there is no indication that anything that we are doing or any result from what we are doing is causing any harm to the State of New Jersey. It is very theoretical.

THE COURT: Well, I just find it difficult to picture why, just in the normal course of purchasing and selling these securities to the secondary market, they wouldn't come into the possession of New Jersey purchasers?

MR. FLUMENBAUM: New Jersey purchasers can purchase those securities if it is an unsolicited transaction. There is nothing improper about a New Jersey resident seeking to purchase those securities on his own.

What New Jersey doesn't allow is the solicitation of those to New Jersey residents.

THE COURT: Then you will have to bring me up to date on the law.

A broker cannot sell any security which isn't authorized or registered in a particular state to a person in that state?

MR. FLUMENBAUM: Right, depending on the security and depending on what market it trades. The law right now is if, for example, it was a New York Stock Exchange security, there would be no restrictions. They could sell it — you wouldn't have to get specific registration from New Jersey.

THE COURT: We are dealing now with over the counter?

MR. FLUMENBAUM: Right, for NASDAQ small cap, which are approved by NASDAQ and registered with the SEC, there is a 25-day period in which the broker/dealer can sell that security only to residents of states which have approved that security for sale.

THE COURT: All right.

So then the method which —

MR. FLUMENBAUM: And that only relates excuse me, your Honor. That only relates to solicitation of sales.

THE COURT: Yes.

MR. FLUMENBAUM: They can sell it to anyplace if it is an unsolicited sale.

THE COURT: All right.

MR. FLUMENBAUM: That goes to the issue of what is the New Jersey interest here.

New Jersey concedes in its brief that Goldmen can sell to New Jersey residents in nonsolicited transactions, can sell to broker/dealers, can sell to financial institutions, can put brokers outside of New Jersey and sell to customers located in other states, and all we are talking about is a situation where in two days, two business days from today they are going to be preempted by federal law from any restriction, both within New Jersey and outside of New Jersey.

THE COURT: All right. We are talking about this interval between the original issue and the cutoff date of the new statute. But from the —

MR. FLUMENBAUM: The new statute —

THE COURT: I let you talk, let me talk a second.

From New Jersey's perspective they can envision these securities coming into the possession of New Jersey residents, and has some interest in protecting New Jersey residents. Whether or not it is solicited by brokers, New Jersey residents may have read about it someplace and say I would like to buy some of those securities, and then from day one

they could purchase those securities if they went and requested the broker to sell it to them.

So you could have securities coming into the possession of New Jersey residents.

MR. FLUMENBAUM: That would be perfectly lawful.

THE COURT: But that's not the point. It's lawful, but they, nevertheless, New Jersey residents, will be holding these securities. Lawfully.

MR. FLUMENBAUM: Lawfully.

THE COURT: But as the state has an interest in protecting them, and sometimes you can take a bath even lawfully when you buy securities.

All right, go ahead.

MR. FLUMENBAUM: But the issue here, remember, I think is very important to emphasize, there is no claim that these sales are being done in any fraudulent manner. And the issue that we have sought a declaration on has to do with sales to residents outside of New Jersey, in states in which those states have specifically approved those transactions.

So what we have here is New Jersey imposing its regulatory will on nonresidents and saying to those nonresidents, you have to pass two regulatory hurdles. You have to be not only approved in the state in which you reside, but you have to also be approved by the New Jersey regulatory scheme.

That is inappropriate. I think it's a direct burden on interstate commerce, and I think it is a discriminatory burden.

So under any of the standards used by the Supreme Court and the Third Circuit, I think that that violates the commerce clause.

Then when you impose on that the balancing tests in which you talk about what are the interests involved, and you superimpose on that balancing the fact that the key here is the sales to nonresidents, outside of the state where New Jersey really does not have a primary interest in protecting those residents, and then you superimpose federal regulation which encourages market efficiency and uniformity and diminishes the role of the state in terms of the registration process, not in terms of the regulation of fraud, and I think that the state ignores the fact that it has significant responsibilities with respect to any sales that go on in New Jersey if they are done fraudulently, and we are not suggesting that they don't.

The only issue here has to be — is the issue of selling in a nonfraudulent way to residents outside of New Jersey. It is a very narrow issue.

As applied in this case, I think the commerce clause analysis just dooms what the securities bureau is attempting to do.

THE COURT: All right, let me hear from the state, Ms. Thayer or Mr. Rabinowitz.

MS. THAYER: If it is satisfactory with you, Mr. Rabinowitz will speak to the commerce clause issues and I will handle the others, and I don't know if you prefer one or the other of us to go first.

THE COURT: Why don't we take abstention first and get to the commerce clause issue if I have to abstain.

MS. THAYER: We obviously feel the Younger abstention doctrine does apply in this case.

Cease and desist was issued. It is not specifically ex parte as they claim, because that's the way they are always issued. The bureau chief has the authority to issue an order such as that to stop behavior that the bureau feels is potentially damaging.

THE COURT: What immediate relief could the person get, the entity get, which would present the constitutional issue and could be decided by the state in an authoritative manner in time to prevent all the injury which the state claims it might have?

MS. THAYER: They can seek relief through the bureau chief. It can be done on an expedited basis. If they are not happy with what the bureau chief decides, they have all the regular rights of appeal from that point.

THE COURT: But how long would that take?

MS. THAYER: It could be done as quickly and as expeditiously as this was. They can seek emergency relief. It is set out clearly in the regulations and in the statute.

THE COURT: You cited something in your brief, but I forget what it was, give me the — you say it is a statutory provision?

MS. THAYER: New Jersey Administrative Code provision.

THE COURT: Would you tell me what that says?

MS. THAYER: That is the one that gives that procedure for emergent relief.

THE COURT: Give me a copy. Let me see what it says.

MS. THAYER: It is 1:1-12.6.

MR. FLUMENBAUM: The relevant provisions would be B and C of that statute, your Honor.

THE COURT: I've only read A. I'm a slow reader. (Pause.)

THE COURT: All right. Thank you. Yes, go ahead.

MS. THAYER: Given that, your Honor, it is the state's contention that Goldmen has sufficient remedies to not pursue the Younger abstention doctrine.

We think the cease and desist order was considered coercive. We think it was issued with a substantial basis and they have the right to appeal that.

They were on notice that a cease and desist was potentially going to be issued, I believe as early as Friday, November 8.

THE COURT: But that was long after they had already sold the stocks.

MS. THAYER: That's true. We did not find out that they sold the stock until November 7.

THE COURT: According to their affidavit, they informed you during the negotiation of the consent decree that that's what they planned to do, they planned to withdraw the New Jersey application and consent to the fact that they were not exempt under certain provisions of the New Jersey statute and that they would sell just to out of state people.

MS. THAYER: I'm not aware that the bureau representatives were told that, but even if they were, it says nowhere in the affidavit that they were told it was going to be sold from New Jersey.

Goldmen had an office in New York for quite awhile. It did close during the summer. There is no reason to believe they couldn't have opened another office in another state to sell these securities.

The fact they may have been going ahead to sell it doesn't necessarily mean they were going to sell it from the State of New Jersey.

THE COURT: All right.

Yes, that's it on abstention?

MS. THAYER: I can go on.

THE COURT: Yes, go on. Give me more.

MS. THAYER: I think that certainly important state interests are implicated in this matter, and that would hit on the second prong often Younger abstention test.

As we pointed out and as has been agreed, the regulation of securities is an important issue for the State of

New Jersey to deal with, and there are certainly interests to protect the public that need to be considered here.

In terms of — Mr. Flumenbaum's argument that in order to get proper relief he would have had to use Section 69 of the New Jersey Securities Act, I disagree. That is usable when we want to go to Superior Court to seek an injunction.

The bureau chief has the power to issue cease and desist orders as well as many other remedies against possible violations of the law and if it is decided at that point the bureau chief is going to do that, the cease and desist at that time.

The option of us waiting the 20 days in response to their filing the complaint for declaratory judgment would have rendered some of our action moot because sales would have continued during that entire 20-day period if we waited the 20 days to answer, even if we came to you with an answer on the declaratory judgment within the 20 days.

THE COURT: Why couldn't you have gone into state court for immediate relief?

MS. THAYER: We could have, but we can also issue the cease and desist, which is a very quick way to tell Goldmen that we didn't think they should be selling that stock from New Jersey.

THE COURT: This is quite different from Williams against Red Bank Board of Education. There you had an ongoing administrative proceeding. It would have been referred to the commissioner of higher — the commissioner of education would have referred it to an administrative law judge. You had a regular judicial kind of proceeding underway.

MS. THAYER: I agree with that. I also believe the issuance of a cease and desist began the administrative proceeding.

THE COURT: That was after the complaint was filed here.

MS. THAYER: They were served after the complaint was served in our office. I believe the complaint was filed 8:30 Tuesday morning and was delivered to us at 4:30 or so in the afternoon. The cease and desist had been signed.

As I said, they were put on notice that the cease and desist was very likely to occur.

THE COURT: All right.

MS. THAYER: As to the third prong, that state proceedings must afford an adequate opportunity to deal with their issues, the cases I cited in the brief that state courts will handle constitutional issues and that in fact it is often a priority and a preference to have to go through the administrative process so the administrative agency can use its expertise and knowledge of the field to set out, at least, the basic positions of that agency.

They have a better knowledge of the subject matter and they are more experienced with that topic.

I would also like to point out, as plaintiff mentioned, that there are several other market makers in this stock right now. So I believe that their irreparable injury claim is softened considerably by that fact.

Goldmen is not prevented from doing any other business in that time if it is not the Imatec securities.

Goldmen can also sell to dealers and people can buy and sell if they are soliciting Goldmen. They can buy and sell the shares of Imatec.

THE COURT: All right, good. Thank you.

Mr. Rabinowitz, what about the commerce clause?

MR. RABINOWITZ: Yes.

I think the Supreme Court precedence and from this Court's holding in cases like CCC Franchising, it's clear that there is no direct burden on interstate commerce here.

Those cases all involve where you — a state regulation regulates conduct that occurs wholly outside of the state.

One thing is obvious here, what we are regulating is active teams of broker/dealers located in New Jersey. All that's going on here is that the state is extending to nonresidents the same protection it extends to residents.

THE COURT: What business is that of this state if the other states say we have given you the protection we think you need? Why should New Jersey come and say we think you need more protection than California thinks you need?

MR. RABINOWITZ: I'll answer that in two responses. It relates to the commercial reputation of New Jersey. New Jersey has been known as a place where there are penny stock manipulators. As a result of that —

THE COURT: There is no allegation of that here.

MR. RABINOWITZ: No, but you don't need that.

THE COURT: You don't like their income flow of the last couple of years, and maybe it's a blind issue. I don't know whether that is part of your thinking or not.

MR. RABINOWITZ: The question is whether New Jersey can take prophylactic measures to insure the business reputation of New Jersey.

The business reputation of New Jersey is certainly affected if as a general matter people —

THE COURT: I like your phrase, prophylactic measure, because that would permit you to do practically anything, on the bare possibility that something wrong might be going on.

There is nothing practically that couldn't be justified under the theory that this is a prophylactic measure. I think that is a very apt phrase to describe what's happening here.

MR. RABINOWITZ: No, and that was clearly upheld by the Court in the N-Tex case, the case we cited which was directly on point, where Texas — the Texas appeals court upheld the identical regulation with respect —

THE COURT: But in a different context.

MR. RABINOWITZ: In the only — the only — it was a security in Texas. They basically said Texas has an interest -let me read from — "interest preventing fraudulent conduct within its borders, which includes interests in taking precaution as to prevent fraud."

That was a case where the exact regulation at issue here was at stake, whether or not someone within Texas could

sell to out of state residents a security that was not registered in Texas.

The Court held that Texas has sufficient interest in protecting its reputation and protecting Texas residents to uphold that regulation.

If you look at the other two cases which are not directly on point, which would be the Resource Oil case and the Newsome case, where the issue was whether or not a state can regulate broker/dealers who can — require registration of broker/dealers who claim they only sell out of state customers. In that case both courts had no problem saying yes.

Now, basically the people out of state who want to buy that security. In fact, one of the cases, the evidence is quite clear in the — Court decision was quite clear, I'm sorry, and that the — they are only selling securities which qualified for registration in the other states.

They said that doesn't matter. You're selling from our state. You have to be registered here even if all you're selling is what goes out of state.

THE COURT: What about the effects of the new statute?

MR. RABINOWITZ: I don't see —

THE COURT: I guess that would not affect the original issue. That would affect the secondary market.

MR. RABINOWITZ: Indeed, when we leave federal court we can bring civil charges. Purchasers during this period can seek rescission for whatever occurred while it was

legal in New Jersey because there was no preemption by federal law.

I don't see how the federal government's change of the law has any effect on this, except whether at some point, you know, the injunction, our injunction has to dissolve because of preemption issues.

If we look at the issue of direct regulation, which I wanted to go through the three steps here, if you look at direct regulation, there is no basis for saying there is direct regulation of commerce.

THE COURT: Let me just tell you, I have trouble with the word "direct." I know some Courts use it. To me it states a conclusion. After going through the analytical process in some circumstances, you say this is direct, the other is indirect, therefore it can't go.

You've got to go beyond direct and indirect.

MR. RABINOWITZ: There is no basis — well, when relying on — what I'm relying on are the cases which discuss direct. It has to be regulation of commerce that occurs wholly outside of the state.

This is a case where we are regulating commerce that occurs within New Jersey. There is no dispute.

This is not where New Jersey is trying to say in any way that because we have registered in New Jersey, people in Pennsylvania can't buy from Pennsylvania brokers. They certainly can.

This is not in any sense a case where we are claiming we have a vote to power over what happens in other states.

It is not like we have in some of the takeover cases. That is the point I want to make.

There is no case anywhere that I'm aware of which says that this is the type of statute which requires per se invalidation because it is a direct regulation.

We do not try to affect what happens in other states. We are affecting transactions between New Jersey brokers and out of state people.

What we are all really doing here is extending the same protection to nonresidents that we have extended to residents. Indeed, that is a standard feature of the law.

It is not as if New Jersey has a thing that certain products are deemed dangerous to New Jersey residents. They are not protected if they come into New Jersey courts.

That raises, as we suggested, I haven't looked into the detail, the privilege and immunity problem, to say we cannot do what we are trying to do here.

THE COURT: You can put it the other way. You are preventing residents of other states from having the opportunity to receive offers with respect to this New Jersey —

MR. RABINOWITZ: And when New Jersey — when New Jersey extends to other states, the residents of other states who purchase dangerous products in New Jersey —

THE COURT: There is nothing to establish this product is dangerous. It is only established that they haven't registered in New Jersey.

MR. RABINOWITZ: The reason that New Jersey denies registration is basically the judgment by the New Jersey bureau that these products don't seem to be the types of products that should be put into commerce in New Jersey.

It is not like —

THE COURT: You are preventing it from being put in commerce outside New Jersey.

MR. RABINOWITZ: We have no effect on that.

THE COURT: Oh, sure you do. It's been approved in California, and here somebody in New Jersey can't sell to California people. That's outside New Jersey.

MR. RABINOWITZ: In Pike, the Supreme Court there said that Arizona clearly has legitimate interest from preventing unfit produce. It didn't necessarily mean contaminated, from leaving Arizona to protect its commercial reputation.

I don't see that what New Jersey is doing is preventing the same type —

THE COURT: This isn't forbidden fruit, as far as we know.

MR. RABINOWITZ: I'm saying the state can take no measures to determine or to qualify what it thinks is a proper security.

It is quite clear the merits review, which to some extent is at issue here, has been up held by the federal courts.

The federal securities law clearly gives states the rights to impose higher standards on the securities that they are allowing in their states.

The North Star case, which I cited, which did that. In North Star the precise issue did not come up because there is no allegation of sales to other states. The case did uphold merits review.

This is simply an incidental effect of merit review. It is extending New Jersey had to determine that certain security upon looking at them and upon other facts are not fit for New Jersey residents.

THE COURT: You haven't made such a finding here. All you made was a finding that they have withdrawn their application for registration. Therefore we are going to prohibit sales to people outside of New Jersey where the sale has been approved.

MR. RABINOWITZ: But in that case anyone who is afraid of such a finding can simply withdraw their registration and start selling out of state. That would be too easy for people who want to sell the commercial reputation of New Jersey.

I would like to say something about the Media Products which they rely on. First of all, I would like to say I misspoke about Media Products in my brief, because I said the Court should have held it was a direct regulation of interstate commerce. It did hold that.

It then went to the Pike balancing test as an alternative holding. There the Court was only willing to find that Arizona's commercial reputation is not at stake in a case

where the relationship to commercial reputation is far more tenuous than here.

In that case you have an Arizona corporation who had a public offering which was being distributed solely by out of state brokers.

There the Court would only say that there was no threat to New Jersey commercial reputation based on the fact that the company disclosed its special prospectus, that Arizona did not qualify the security and, further, that Arizona was going to bring a lawsuit about this sale.

Here there is nothing in their prospectus which discloses that. New Jersey's reputation is clearly on the line here.

Furthermore, in cases like this, the Supreme Court has warned the Courts, and the Third Circuit to some extent has gone further, that this Court should not second guess state's views of the purposes of their legislation, whether it would satisfy the purpose of the legislation.

That was in CTS commenting on Edgar, which to some extent was based on Professor Fischel's shells views of how good takeovers were. They said if states don't accept Professor Fischel's shells views, that's the state.

In the Third Circuit there are three standards of review. One is highly deferential review, which occurs where the state has important interests at stake. The regulation of the securities market is an important interest of the state. They have just conceded that point. That point is, you know, is not in dispute.

It is New Jersey's view that in order to protect that reputation it has to make certain that securities which it does not think are fit, that it will not register, cannot be sold through New Jersey. If you want to sell to New Jersey you have to go through the registration process, and they simply did not do that.

I mean, there is no case anywhere which begins to support their view of the commerce clause. There is no case anywhere. I gave the triumvirate of Newsome, N-Tex and The Resources, which was directly on point.

The only possible basis for distinguishing it, which I don't think is really right, is that the securities included land in Texas. That had nothing to do with the interest in fraud, which is what the real holding was in the case. And the other cases were right on point in terms of broker/dealers have to be registered even when they want to sell securities that qualify for sales in other states.

All those cases held that a state has a legitimate interest in extending — in extending those laws to sales from the state outside of the state.

Again there is nothing here about a veto power on anything. Goldmen can, it has offices in other states, sell in another state. It just doesn't happen to have an office there.

There is hardly any effect on interstate commerce at all, let alone a discriminatory one. There are other market makers in this security.

Even if — it is just hard to see where there is anything which begins to prop up their claim. I'll be glad to answer any questions the Court has.

THE COURT: I have a question for Mr. Flumenbaum.

The argument here is, as I understand it, that regulations of securities industry is an important state interest, and I think it clearly is.

In order to determine whether or not a sale of securities is fraudulent or improvident in some other respect, there has to be registration, and New Jersey has an interest in not permitting fraudulent or otherwise improper sales by people selling securities from New Jersey.

Why isn't that an important interest which requires that anybody who wishes to sell securities or an original issue from New Jersey be required to register?

MR. FLUMENBAUM: Well, what we have here is not that stark an issue, because as we talked about before, New Jersey allows sales to New Jersey of unsolicited transactions. There is nothing that prevents it.

What we have here is New Jersey — and I think Mr. Rabinowitz made the argument against the state's position more effectively than I may have done, because he talked about how they keep extending their own protections, their own regulations to nonresidents. That's precisely what the commerce clause —

THE COURT: They are only regulating the New Jersey broker.

MR. FLUMENBAUM: What they are doing is preventing the New Jersey broker from selling the securities in which there is no allegations of fraud, that's been registered with the SEC and NASDAQ —

THE COURT: They don't know that there is no fraud. There is no allegation of fraud.

But under your theory the most fraudulent dealer could start selling securities out of New Jersey all over the United States and there is no way that the Bureau of Securities will know about it unless they are required to register.

MR. FLUMENBAUM: No. They would have the authority under their own regulations, because of their regulation of the broker/dealer within the state, and gives them the authority to go after that broker/dealer for fraudulent sales practices. That they always have, whether the securities are being sold outside or inside the state.

THE COURT: That is closing the door after the horse escaped.

MR. FLUMENBAUM: I don't think so, your Honor. That's the way most security regulations occur.

What you have here is they are using the registration process improperly in order to impose its views of the security on a national market, and that's precisely what the interstate commerce provision, you know, prevents.

We are only involved with securities that are registered by the SEC. We are talking about a security that is on NASDAQ, that has been approved and qualified in 16 states and is being sold to those 16 states.

If they believe these transactions are occurring to nonresidents, I believe they have authority under their regulation of the broker/dealer to seek to deal with that. We are not challenging that.

What we are challenging is the per se ban that they have in trying to sell a lawful item to a nonresident and imposing a New Jersey registration requirement on states which have their own registration requirements and which permit their own residents to purchase that security. What we are saying is that is improper.

This is a very different situation than N-Tex and those oil and gas lease cases that Mr. Rabinowitz relies on. All of those cases involve securities that were not nationally sold. These are oil and gas lease interests that are being called securities and are defined as securities. There is no indication that the states in which they were being sold had approved those transactions in any of those cases. Fraud is clearly the concern in each of those decisions.

The Florida case doesn't even involve the issue of sale to nonresidents. It involves whether a Florida seller has to be registered.

There is no dispute in this case that Goldmen is properly registered.

Newsome was a jurisdictional case. In those cases, they are fraud cases involving oil and gas leases within the state which has regulated it. Very different from this kind of case.

The Arizona Media Products case is directly on point. Despite Mr. Rabinowiz' attempt to suggest it is wholly outside Arizona, the Court there specifically found that the offering of the stock and the sale of the stock was, quote, from Arizona. The contacts were sufficient. Just the same position that New Jersey is taking.

It then went on to find that having determined it was from Arizona it violated the interstate commerce clause, and it violated it as a direct burden and under the Pike balancing test.

With respect to abstention, there was no ongoing proceeding. If you look at the O'Neal case or Red Bank, the people were using federal lawsuits as a means of appealing or interrupting ongoing state proceedings. That is not our position here today.

The adequacy of the agency had appealed. If you look at the section Miss Thayer handed up to you, there are no time limits in that section. There is no procedure for expedition. There is no requirement as to timing.

It is totally within his discretion and he is — in a situation where there is irreparable harm that can occur, this effectively diminishes the act to protect the constitutional interest.

THE COURT: All right, let me put an opinion on the record.

Mr. Rabinowitz, do you have something to say?

MR. RABINOWITZ: Just two quick things.

In Newsome the District Court reached the conclusion that despite the defenses assertion that they only often sold securities to nonresidents in accordance with the laws of their respective states, with respect to Media Products, what the Court — there are two important points to notice.

The Courts found that was a sale from Arizona, that's correct. That was important because in later cases, Chrysler

Credit Corporation case in the Southern District of New York, they were able to use that from fraud, distinguish it from fraud.

If all the agents are outside the state, Arizona still has the power to regulate the fraud because it is from their person in Arizona. The links to interstate commerce, I mean, the links to the state's reputation were far more tenuous there, and the Court did not say there was no link to notice that this company had fully disclosed all of Arizona's opposition to the offer. Thank you.

THE COURT: I'll put an opinion on the record, reserving the opportunity to make any nonsubstantive corrections after I have received the original copy of the transcript.

Plaintiff A.S. Goldmen is a securities broker dealership and investment bank organized under the laws of New York and has its principal place of business at 99 Wood Avenue South, Iselin, New Jersey. Defendant New Jersey Bureau of Securities is a regulatory agency that administers the Uniform Securities Law, and is an agency of the New Jersey Department of law, Division of Consumer Affairs.

This action arises out of the initial public offering of securities of Imatec, Ltd., for which A.S. Goldmen serves as underwriter. Imatec is incorporated in the State of New York and is located at 150 East 58th Street, New York City. It develops, designs, markets and licenses image reproduction and enhancement technology.

Imatec, Ltd. filed a registration statement and subsequent amendment with the Securities and Exchange Commission on May 13, 1996 and on May 21, 1996 filed an

application with the Bureau for registration by coordination pursuant to N.J.S.A. 49:3-61.1.

During its investigation the Bureau issued a comment letter dated June 26, 1996 seeking additional information. Underwriter's counsel, the firm of Orrick, Herrington and Sutcliffe, responded by letter dated July 9, 1996.

Because of a concern about the financial conditions of Imatec, among other things, the Bureau notified the underwriter's counsel that it was considering the issuance of a stop order pursuant to N.J.S.A. 49:3-64. By way of letter dated August 7, 1996, the Orrick firm asked that the Bureau not enter such an order. By letter dated August 8, 1996, it requested permission from the Bureau to withdraw Imatec's application for registration in New Jersey, simultaneously agreeing to the entry of a consent order which denied certain specific exemptions under the New Jersey statute.

A formal notice of withdrawal was issued by the Bureau dated August 13th, 1996 granting Imatec's request for withdrawal. The consent order was entered on October 23, 1996, denying specific exemptions. The registration filed with the SEC for Imatec became effective at 4 p.m. October 28, 1996. The consent order did not, as the Bureau originally contended, bar plaintiff from selling or offering Imatec's securities from plaintiff's office in New Jersey to residents in other states where such securities are qualified. During discussions with the Bureau concerning the consent order, plaintiff's attorneys advised the Bureau that it intended to make such sales. Plaintiff's attorneys were not advised of the Bureau's position until November 7, 1996, 15 days after the consent order was entered into and nine days after plaintiffs began making such sales.

In any event, Orrick submitted a final Blue Sky memorandum on October 29, 1996 stating that sales of Imatec could be made subject to certain conditions in the following states: California, Colorado, Connecticut, Maryland, Nevada, New York, Rhode Island, Utah and Wyoming. Goldmen began selling Imatec stock at 9:30 a.m. on October 29, 1996 with the initial offering sold fully by 2:49 p.m. that afternoon. Goldmen then began trading in the after-market.

When A.S. Goldmen began selling the Imatec offering at 9:30 a.m. on October 29, 1996, it programmed its trading computers to block sales of Imatec securities to residents of states, including New Jersey, in which Imatec was not qualified for sale. A.S. Goldmen brokers also were told by the firm's compliance department that Imatec's securities could not be sold to New Jersey residents or to residents from any other state where the securities had not been qualified for sale.

After the Imatec offering was fully sold, A.S. Goldmen began trading in the Imatec after-market. As a NASDAQ market maker, A.S. Goldmen stands willing to make a market in Imatec along with certain other brokerage concerns and continues to buy and sell its securities. If the Bureau's cease and desist order is given effect, it will no longer be able to fill the role of principal market maker. The absence of this principal market maker would most likely have a substantially adverse effect upon the purchases of the Imatec stock and most likely would have a severe adverse effect on Imatec, if not having the effect of destroying its business.

Plaintiff's counsel were informed on the afternoon of Friday, November 8, 1996 that the issuance of a cease and desist order was likely. Such an order was issued by the Chief of the Bureau of Securities pursuant to N.J.S.A. 49:3-67(a)

at 4:15 in the afternoon of Tuesday, November 12. It was served upon plaintiff the following day, November 13.

On November 12 plaintiff filed its complaint and sought an order requiring the Bureau to show cause why an order should not be granted declaring that (i) the New Jersey Securities Act, as applied to securities that were not registered or exempt from in registration in New Jersey and were sold by brokers located New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale, violates the commerce clause of the United States Constitution; and (ii) that the New Jersey Securities Act does not apply to securities that were not registered or exempt from registration in New Jersey and were sold by brokers located in New Jersey to residents of states other than New Jersey in which the securities were qualified for sale.

An emergency hearing was held on November 14, at which time I issued temporary restraints against the Bureau and scheduled a hearing on plaintiff's application for preliminary injunctive relief on November 20, 1996.

It is plaintiff's contention that the Bureau's order, which forbids it to sell securities from New Jersey to residents of states in which the securities are qualified for sale violates the commerce clause of the United States Constitution. Plaintiff relies principally upon *Edgar* v. *Mite Corp.*, 457 U.S. 624 (1982).

The Bureau contends the Court should abstain from hearing this case on *Younger* abstention grounds, see *Younger* v. *Harris*, 401 U.S. 37 (1971) and its many progeny; and that in any event, upon application of proper balancing principles, the action of the Bureau did not violate the commerce clause, relying principally upon *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

As to the *Younger* abstention contention, the doctrine is currently recognized as being fully applicable to civil proceedings in which important state interests are involved. *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423 (1982).

In that case the Court enunciated the three requirements for the application of the *Younger* abstention doctrine: 1) the existence of an ongoing state proceeding which is judicial in nature; 2) the implication of important state interests; and 3) an adequate opportunity to raise constitutional challenges in the state court proceedings.

I conclude that only one of these criteria is applicable in this case. As to the first, the existence of an ongoing state proceeding which is judicial in nature, such a proceeding was not ongoing at the time that the complaint was filed. A cease and desist order was issued shortly after the complaint was filed, but even the issuance of that order in my judgment would not constitute an ongoing proceeding which is judicial in nature.

It is totally unlike the situation which prevailed in *Williams v. Red Bank Board of Education* where formal proceedings were underway and in which the plaintiff could have asserted her federal contentions.

I conclude that there are important state interests involved in the case. Broadly speaking, this concerns the regulation of securities sales, and that is a subject in which obviously the state has an important interest.

As to an adequate opportunity to raise constitutional challenges in the state proceedings, ultimately the plaintiff here could have raised constitutional issues following the proceedings proscribed in the statute and the regulations.

Ultimately it might have gone to an administrative law judge and ultimately an appeal would be available through the courts of New Jersey up to the New Jersey Supreme Court.

However, the time that would have been required to accomplish that purpose would have made it all academic and any federal contention would not be raised in time to do the plaintiff any good whatsoever, that is, if there were an adequate opportunity to raise constitutional challenges, which I think there were not. The case is also within an exception to the abstention doctrine.

As I stated in New Jersey *Philadelphia Presbyteria* v. *New Jersey State Board of Education*, 482 F. Supp. 968, (1980), "The United States Supreme Court has consistently recognized that the *Younger* doctrine of abstention will not be applied in extraordinary circumstances where there will be great, immediate and irreparable harm if the federal court does not intervene."

That case was affirmed in a citation which I don't have with me at the moment. The ruling on abstention was affirmed in a majority opinion on the ground that all parties in the federal proceedings were not before the Court in the state proceedings, and the concurring opinion agreed that the *Younger* exception was applicable. Clearly, the *Younger* exception, if we get that far even, would be applicable in this case.

I have examined the Administrative Regulations to which counsel for the Bureau had referred me, namely, N.J.A.C. 1:1-12.6, and it is quite clear that the emergent relief required in this case would not be available under the proceedings defined in that Administrative Code.

There is no assurance that timely actions could be obtained. Initially application would have to be to the Bureau Chief who would be most unlikely to grant it having just issued a cease and desist order, and relief from his ruling could not conceivably proceed with the alacrity that would be required to avoid injury which the cease and desist order would impose.

Consequently, I conclude that the *Younger* abstention is not applicable and I am required to proceed to the other issue, the principal issue in the case, which is whether the imposition of the New Jersey cease and desist order in the circumstances of this case would violate the commerce clause.

The general rule of law is set forth in *Edgar* v. *Mite Corp.*, 457 U.S. 624 (1982). There the Court restated the *Pike* v. *Bruce Church, Inc.* standard, which is that not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits.

The commerce clause, however, permits only incidental regulation of interstate commerce by the states, direct regulation is prohibited, and therefore the balancing test is required in each case.

It is clear to me in this case that the regulation imposes an undue burden on interstate commerce utilizing the *Pike* v. *Bruce Church* criteria. The statute here purports to regulate the sale of securities by a New Jersey broker. The sales which it purports to regulate are those which are of a security which had been registered with the SEC, approved by

NASDAQ and approved by each of the other states in which the securities are to be sold.

In this situation where no sale will be made to New Jersey residents, New Jersey is reaching out to prohibit a sale which takes place in a national securities market, one which is regulated by each state to protect its own citizens, and one which is initiated by registration with the SEC.

The state's overall interest in securities regulation is substantial. Its interest in this particular application of its regulation is highly insubstantial. It purports to be concerned by the reputation of the State of New Jersey as a boiler shop pouring fraudulent securities into a national market, but there are no allegations of fraud here. The securities have been examined by the jurisdictions in which they are to be sold, and the effect simply is not to prevent fraud. It is simply to prevent the consummation of sales of securities in a national market.

Thus the interest of the state is minimal in these circumstances and the impact upon the national securities market is very substantial indeed. Consequently, I think it is an impermissible application of the New Jersey Securities Act.

That brings us to the question of whether injunctive relief should be granted. Injunctive relief is granted when four criteria are met. There must be irreparable injury. The interests of other persons and the defendant must be weighed, the interest of the public must be weighed, and there must be a likelihood of success on the merits.

I have concluded that there is a likelihood of success an the merits as I have just stated. There would be irreparable injury to the market maker, the plaintiff in this case, because

it would remove it from the critical role it is playing in the sale and distribution of these securities.

The impact upon the Bureau is negligible. These are not securities which are being sold to New Jersey residents in whom it has a primary interest. It has minimal interest in giving added protection to purchasers in states where the purchasers are already protected by those state's regulatory mechanism and where a national agency, the SEC, and where NASDAQ have previously been vehicles for registration of the securities.

Consequently, the injury to the Bureau I would say is nonexistent. Weighing the interest of other parties, the company involved here, Imatec, would likely suffer very substantial injury if the sale and distribution of the securities were impaired, interfered with. These injuries are spelled out in more detail in the affidavit of Dr. Hanoch Shalit which was filed with the Court this morning. That affidavit details the business circumstances of Imatec, Incorporated, the consequences of implementation of the cease and desist order, and I accept those representations as being correct.

The public interest is also implicated. The public interest here is preserving the free flow of commerce under the Constitution of the United States, and consequently the public interest points in the direction of granting injunctive relief.

Consequently, a preliminary injunction will be entered and the further development of the case can await motions or other applications by any of the parties.

Do you have an order?

MR. FLUMENBAUM: We do not, your Honor, but I will — we do, I'm sorry, we do.

THE COURT: I don't know what would be required by way of a bond. I don't see any particular damages, but technically I have to require a bond.

Why don't I order a $10,000 bond.

Mr. Rabinowitz, do you see any likelihood of monetary loss to the state? I can't see that you're going to--

MR. RABINOWITZ: Let me speak to my client.

THE COURT: Yes, all right. (Pause.)

MR. RABINOWITZ: A $10,000 bond will be acceptable.

THE COURT: All right, that will cover any expenses or costs.

MS. THAYER: I have a question.

I haven't read through the preliminary injunction shun.

We do have an ongoing investigation of Goldmen. Pursuant to that we scheduled some depositions of agents and some of the principals.

Do you believe that the injunction will prohibit those depositions from going forward?

THE COURT: No, I wouldn't think so. Would you?

MR. FLUMENBAUM: No.

THE COURT: You are free to make any investigation, and if something turns up, come back.

I've changed the first paragraph to read, "Plaintiff is likely to succeed on the merits of its contention that the application," et cetera.

I'm not making a final determination in this regard. That can await any further hearings.

I put in a provision for a bond in the amount of $10,000.

All right, here it is, and, Miss Thayer, I can return —

MS. THAYER: I'll come up after we are done. Thank you.

THE COURT: All right. Good. Thank you very much.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

97-5618

A.S. GOLDMEN & COMPANY, INC.

v.

NEW JERSEY BUREAU OF SECURITIES,

Appellant

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and RENDELL, Circuit Judges, and GARTH, Senior Circuit Judge[1/]

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit

---

1/ As to panel rehearing only.

in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied. Judge McKee would have granted rehearing.

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: February 9, 1999

cc: G.C.
K.O.
E.S.
M.F.
M.L.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

U.S. CONST. art. I, § 8, cl. 3.

The Congress shall have power ...

... To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;

N.J. STAT. ANN. § 49:3-60 (West 1998) (text as of 1996)

49:3-60 Offer or sale; registration requirement; exemptions

It is unlawful for any security to be offered or sold in this State unless:

(a) The security or transaction is exempt under section 3 of this act;

(b) The security or transaction is not subject to, or is exempt from, the registration requirements of the Securities Act of 1933 and the rules and regulations thereunder, other than by reason of section 3(a) or 3(b) of such act and the rules and regulations under said section 3(a) or 3(b), and a report of the offering is filed with the bureau within 30 days of the completion date of the offering, setting forth the name and address of the issuer, the total amount of the securities sold, the price at which the securities were sold, the total number of purchasers of the securities, and the names and addresses of the purchasers of the securities, indicating the number and amount of the securities each purchased. The fee for filing the report with the bureau shall be $250.00. The information in the report of sale shall be deemed confidential and shall not be disclosed to the public except by order of the court in

court proceedings; [subsequently deleted by amendment, P.L. 1997, c. 276.]

(c) [deleted by amendment, P.L. 1985, c. 405.]

(d) [deleted by amendment, P.L. 1985, c. 405.] or

(e) The security is registered under this act.

STATE OF NEW JERSEY
BUREAU OF SECURITIES
P.O. Box 47029
Newark, New Jersey 07101
(201) 504-3600

IN THE MATTER OF:	:	
IMATEC, LTD.	:	CONSENT ORDER DENYING SPECIFIC EXEMPTIONS
SR-9277	:	
Respondent.	:	

To: Dr. Hanoch Shalit, Chief Executive Officer
Imatec, Ltd.
150 E. 58th Street
New York, New York 10155

Clifford A. Brandeis, Esq.
Zuckerman Gore & Brandeis, LLP
900 Third Avenue
New York, New York 10022

Attorney for Issuer

A.S. Goldmen & Co., Inc.
ATTN: Foster Gibbons, General Counsel
99 Wood Avenue
Suite 902
Iselin, New Jersey 08830

Marlene Reed, Esq.
Orrick, Herrington & Sutcliffe
666 Fifth Avenue
New York, New York 10103

Attorney for Underwriter

Continental Stock Transfer & Trust Company
2 Broadway
New York, New York 10004

Transfer Agent & Registrar

1. Imatec Ltd. ("Imatec"), located at 150 East 58th Street, New York, New York 10155, was incorporated in the State of New York on November 17, 1988.

2. On or about May 21, 1996, Imatec filed with the Bureau of Securities ("Bureau") an application to register an offering by coordination, (the "Offering"), pursuant to *N.J.S.A.* 49:3-61.1, under registration number SR-9277. The registration statement, Form SB-2, was filed with the United States Securities and Exchange Commission ("S.E.C.") on May 13, 1996, under the registration number 333-3589. On or about June 24, 1996, Imatec filed, with the Bureau, an Amendment No. 1 to its Form SB-2. On or about July 19, 1996 Imatec, filed with the Bureau, an Amendment No. 2 to its Form SB-2.

3. The Offering is comprised of 1,000,000 shares of Common Stock, 4,000,000 Class A Redeemable Warrants, and 4,000,000 Class B Redeemable Warrants. Each Class A Reddemable Warrant and Class B Redeemable Warrant entitles the holder to purchase one share of Common Stock.

The registration statement also covers an aggregate of 551,785 shares of Common Stock and 4,000,000 Class A Redeemable Warrants which may be sold by the bridge selling security holders. An additional 150,000 shares of Common Stock are being registered and may be sold by the founding selling security holders. By letter dated October 7, 1996, counsel for the underwriter informed the Bureau that the securities to be offered, as of October 7, 1996, will be as follows: 1,000,000 shares of Common Stock (150,000 shares to cover over-allotments, if any), and 4,000,000 Redeemable Warrants (600,000 Warrants to cover over-allotments, if any). A.S. Goldmen & Co., Inc. ("Goldmen"), located at 99 Wood Avenue, Suite 902, Iselin, New Jersey 08830 is the underwriter for this Offering.

4. As part of the Bureau's review of Imatec's registration statement, the Bureau issued a comment letter, dated June 26, 1996, with requests for information. Counsel for the underwriter responded by letter dated July 9, 1996.

5. During the course of the review, Bureau staff expressed various concerns regarding the Offering to counsel for the underwriter. Counsel for the underwriter was informed that the Bureau was considering the issuance of a stop order, based on, among other things, the insolvency of Imatec. Counsel for the underwriter responded by letter dated August 7, 1996, asking that a stop order not be entered.

6. After further discussions, counsel for the underwriter orally requested permission to withdraw Imatec's application for registration in New Jersey, and orally agreed to the entry of a consent order denying specific exemptions, as more fully set forth below. By letter dated August 8, 1996, which letter was faxed to the Bureau on August 12, 1996, and received by FedEx on August 13, 1996, counsel for the underwriter requested withdrawal of Imatec's

application from the State of New Jersey. By Notice Of Withdrawal, included herewith, the Bureau granted Imatec's request for withdrawal.

7. The Bureau and Imatec are desirous of resolving this matter without the expense and delay that further proceedings would incur.

NOW THEREFORE, it is on this 23rd day of October 1996 ORDERED that the use of the specific exemptions in *N.J.S.A.* 49:3-50(b)(2), (9), (11) and (12) for the securities of Imatec, Ltd. are DENIED effective upon entry of this Consent Order.

We consent to the form and entry of this Consent Order

NEW JERSEY BUREAU OF SECURITIES

DATED: October 23, 1991

By: /s/ Thomas J. Gaynor
Thomas J. Gaynor
Bureau Chief

IMATEC, LTD

DATED: October 21, 1991

By: /s/ Hanoch Shalit
Hanoch Shalit
Chief Executive Officer

You are further advised that the entry of this Order does not preclude the Bureau Chief from seeking and obtaining other enforcement remedies against you in connection with the claims made against you in this action.

NOTICE OF RIGHT TO HEARING

Pursuant to *N.J.S.A.* 49:3-67(a), this matter will be set down for a hearing, if a written request for such a hearing is filed with the Bureau Chief within thirty (30) days after the applicant receives this Order. A request for hearing must be accompanied by a written response, which addresses specifically each of the reasons set forth in the Order, which formed the basis for its entry. A general denial is unacceptable.

At any hearing involving this matter, an individual may appear on his/her own behalf or be represented by an attorney. If no hearing is requested, the Order shall remain in effect until modified or vacated. If a hearing is held, the Bureau Chief shall affirm, vacate or modify the Order in accordance with the findings made at the hearing.

NOTICE OF OTHER ENFORCEMENT REMEDIES

You are advised that the Uniform Securities Law (1967), *N.J.S.A.* 49:3-47 *et seq.*, provides several enforcement remedies which are available to be exercised by the Bureau Chief, either alone, or in combination. These remedies include, in addition to this action, the right to revoke your registration, seek and obtain injunctive and ancillary relief in a civil enforcement action, *N.J.S.A.* 49:3-69, and the right to seek and obtain civil penalties in an administrative or civil action *N.J.S.A.* 49:3-70(b).

STATE OF NEW JERSEY
BUREAU OF SECURITIES
P.O. Box 47029
Newark, New Jersey 07101
(201) 504-3600

IN THE MATTER OF:	:	
A.S. GOLDMEN & CO., INC., STUART WINKLER, STEPHEN KAPLAN, ANTHONY MARCHIANO, AND FOSTER GIBBONS,	:	**ORDER TO CEASE AND DESIST**
Defendants.	:	

Pursuant to the authority granted to the Chief of the New Jersey Bureau of Securities ("Bureau") by the Uniform Securities Law (1967), *N.J.S.A.* 49:3-47 *et seq.*, (the "Law"), more specifically *N.J.S.A.* 49:3-60, the Bureau Chief has determined that an Order to Cease and Desist should be issued against the named Defendants for the reasons that follow.

BACKGROUND

1. Defendant A.S. Goldmen & Co., Inc. ("Goldmen") has been registered with the Bureau as a broker-dealer since November 1989. Goldmen has a sole business address of 99 Wood Avenue South, Suite 902, Iselin, New Jersey 08830.

2. Defendant Stuart Winkler ("Winkler") has been registered with the Bureau as an agent of Goldmen since

approximately January 1990. He serves as vice-president and secretary of Goldmen, and has supervisory authority over its agents.

3. Defendant Stephen Kaplan ("Kaplan") has been registered with the Bureau as an agent of Goldmen since approximately August 1991. He serves as a branch manger of Goldmen, and has supervisory authority over its agents.

4. Defendant Anthony Marchiano ("Marchiano") has been registered with the Bureau as an agent of Goldmen since approximately February 1990. He serves as president, chief executive officer, and is an owner of Goldmen, and has supervisory authority over its agents.

5. Defendant Foster Gibbons ("Gibbons") has been registered with the Bureau as an agent of Goldmen since approximately September 1996. He serves as vice-president and general counsel of Goldmen, and has supervisory authority over its agents.

6. On or about May 21, 1996, Imatec Ltd., ("Imatec") filed an application with the Bureau to register an offering in New Jersey. Goldmen was listed as the sole underwriter for Imatec on this offering. On or about October 23, 1996, the Bureau and Imatec, through counsel for the underwriter, entered into a Consent Order Denying Specific Exemptions ("Consent Order"). Pursuant to the Consent Order, Imatec withdrew its registration statement from New Jersey, and agreed to denial of secondary trading as more fully set forth in the Consent Order. (A true copy is attached hereto as Exhibit "A").

7. On or about November 7, 1996, Bureau investigators learned that Goldmen may have acted as the underwriter for the Imatec offering, and may have offered and

sold Imatec securities from Goldmen' s New Jersey office. Bureau investigators immediately contacted counsel for the underwriter, as well as outside counsel to Goldmen, in order to determine whether Goldmen, in fact, acted as the underwriter for the Imatec offering. Thereafter, outside counsel to Goldmen informed the Bureau that Goldmen had acted as the underwriter and it was continuing the offer and sale of Imatec from New Jersey.

8. Additionally, on November 7, 1996, the Bureau's supervisor of enforcement gave telephone notice to Goldmen, through its outside counsel, that any further attempt to offer or sell Imatec securities from Goldmen's New Jersey office would be deemed a willful violation of the Law subject to criminal, civil, and administrative penalties.

9. At about 3:45 p.m., Friday, November 8, 1996, Bureau investigators met with Goldmen's outside counsel, Stephen Saxl ("Saxl"), and with Goldmen's vice-president and general counsel, Foster Gibbons ("Gibbons") at Goldmen's New Jersey office. At that time, the Bureau's supervisor of enforcement again gave notice to Saxl and Gibbons that any further attempt to offer or sell the securities of Imatec would constitute a willful violation of the Law subject to criminal, civil and administrative sanctions. Despite this notice, Saxl and Gibbons responded that Goldmen was continuing and intended to continue selling Imatec. Thereafter, Bureau investigators put Goldmen, through Gibbons and Saxl, on personal notice, that the continued offer and sale of Imatec from New Jersey was a willful violation of the Law. Gibbons responded that he understood the Bureau's position, but that Goldmen would continue to offer and sell Imatec.

10. Additionally, at the November 8, 1996 meeting at Goldmen, Bureau investigators obtained documents

previously orally requested from Goldmen's outside counsel. These documents relate to the offer and sale of Imatec. Additionally, Bureau investigators served Subpoena Nos. 2110, 2111, and 2112 on Winkler, Kaplan, and Marchiano, respectively.

11. The Imatec stock and warrants, offered and sold by Defendants, are securities as, that term is defined under the Law.

OFFER AND SALE OF UNREGISTERED SECURITIES N.J.S.A. 49:3-60

12. Defendants have directly solicited customers, offered, and sold Imatec stock and warrants from the State of New Jersey despite the fact that the securities of Imatec were neither registered with the Bureau, nor exempt from registration. *N.J.S.A.* 49:3-60 makes it unlawful for any person to offer or sell a security in New Jersey unless that security is registered or exempt. *N.J.S.A.* 49:3-51 states that an offer or sale in New Jersey occurs when it originates in this State regardless of whether either party is in this State. Every attempt by Goldmen to solicit customers, offer and sell the securities of Imatec to the public constitutes a separate and distinct violation of the Law and is cause pursuant to *N.J.S.A.* 49:3-67(a), and in the public interest, and for the protection of investors, for an entry of an order directing Defendants to cease and desist soliciting customers, offering and selling the securities of Imatec to members of the public.

THEREFORE, it is on this 12th day of November, 1996 hereby

ORDERED, effective IMMEDIATELY, that A.S. GOLDMEN & CO., INC., STUART WINKLER, STEPHEN KAPLAN, ANTHONY MARCHIANO, FOSTER GIBBONS,

AND EMPLOYEES AND AGENTS THEREOF, CEASE AND DESIST from the solicitation of customers, offer and sale of Imatec in or from the State of New Jersey to any members of the public.

By: /s/ Thomas J. Gaynor
Thomas J. Gaynor
Bureau Chief

NOTICE OF RIGHT TO HEARING

Pursuant to *N.J.S.A.* 49:3-67(a), this matter will be set down for a hearing, if a written request for such a hearing is filed with the Bureau Chief within thirty (30) days after the applicant receives this Order. A request for hearing must be accompanied by a written response, which addresses specifically each of the reasons set forth in the Order, which formed the basis for its entry. A general denial is unacceptable.

At any hearing involving this matter, an individual may appear on his/her own behalf or be represented by an attorney. If no hearing is requested, the Order shall remain in effect until modified or vacated. If a hearing is held, the Bureau Chief shall affirm, vacate or modify the order in accordance with the findings made at the hearing.

NOTICE OF OTHER ENFORCEMENT REMEDIES

You are advised that the Uniform Securities Law (1967), *N.J.S.A.* 49:3-47 *et seq.*, provides several enforcement remedies which are available to be exercised by the Bureau Chief, either alone, or in combination. These remedies include, in addition to this action, the right to revoke your registration, seek and obtain injunctive and ancillary relief in a civil enforcement action, *N.J.S.A.* 49:3-69, and the right to seek and obtain civil penalties in an administrative or civil action *N.J.S.A.* 49:3-70(b).

You are further advised that the entry of this Order does not preclude the Bureau Chief from seeking and obtaining other enforcement remedies against you in connection with the claims made against you in this action.

SAUL, EWING, REMICK & SAUL
214 Carnegie Center, Suite 202
Princeton, New Jersey 08540
(609) 452-3100
Michael A. Lampert (ML-1064)

-and-

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
Martin Flumenbaum (MF-9067)
Brad S. Karp (BK-3702)

Attorneys for Plaintiff A.S. Goldmen & Co., Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

A.S. GOLDMEN & COMPANY, INC., 99 Wood Avenue South, Iselin, New Jersey,	:	Civil Action No. 96-5280 (DRD)
Plaintiff,	:	COMPLAINT
- against -	:	(For Declaratory
NEW JERSEY BUREAU OF SECURITIES, 153 Halsey Street, Newark, New Jersey,	:	Judgment)
Defendant.		

Plaintiff A.S. Goldmen & Company, Inc. ("A.S. Goldmen"), by its attorneys, Saul, Ewing, Remick & Saul, and Paul, Weiss, Rifkind, Wharton & Garrison, for its complaint, alleges as follows:

NATURE OF THE ACTION

1. This is an action for a declaratory judgment holding that the New Jersey Securities Act violates the Commerce Clause of the United States Constitution as applied to securities that were not offered or sold to New Jersey residents and that were sold to residents of states (other than New Jersey) in which the securities were qualified for sale. Insofar as the New Jersey Bureau of Securities is presently attempting to prevent A.S. Goldmen, a New Jersey broker-dealer, from selling securities to residents of states in which the securities are qualified for sale, plaintiff requests that the Court order a speedy hearing of this action and advance it on the calendar, pursuant to Rule 57 of the Federal Rules of Civil Procedure.

2. The effort by the New Jersey Bureau of Securities to block the sale of qualified securities to residents of states other than New Jersey violates the Commerce Clause of the United States Constitution. There is no basis in the New Jersey Securities Act for this unprecedented action. While protecting local investors is a legitimate state objective, the State of New Jersey has no legitimate interest in protecting non-resident investors. To hold otherwise would grant the New Jersey Bureau of Securities veto power over securities offerings and sales approved by the SEC and securities regulators from other states. The Constitution forbids such an arrogation of power.

3. Not only is the exercise of such power unconstitutional, but it is misplaced as well. This is not a

situation in which a New Jersey-based broker-dealer is alleged to have engaged in fraudulent securities sales to residents of other states. It is, instead, a situation where a registered broker-dealer is seeking to sell securities to residents of states in which the securities are qualified for sale. This conduct, we submit, is appropriate in all respects. To the extent the New Jersey Bureau of Securities relies on the New Jersey Securities Act to prohibit such conduct, that Act should be declared unconstitutional.

JURISDICTION AND VENUE

4. This Court's jurisdiction is based upon 28 U.S.C. § 1331, insofar as this action involves matters arising under the United States Constitution. Supplemental jurisdiction over the pendent state law claims exists under 28 U.S.C. § 1367. Plaintiff is entitled to declaratory relief pursuant to 28 U.S.C. § 2201.

5. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b), insofar as the defendant resides in this jurisdiction.

THE PARTIES

6. Plaintiff A.S. Goldmen is a securities broker dealership and investment bank organized under the laws of New York and has its principal place of business at 99 Wood Avenue South, Iselin, New Jersey.

7. Defendant New Jersey Bureau of Securities (the "Bureau of Securities" or the "Bureau") is a regulatory agency that administers the Uniform Securities Law. The Bureau is an agency of the New Jersey Department of Law, Division of Consumer Affairs, and has offices located at 153 Halsey Street, Newark, New Jersey.

THE STATUES

8. The relevant statutes of the New Jersey Securities Act provide: **49:3-60. Offer or sale; registration requirement; exemptions**

It is unlawful for any security to be offered or sold in this State unless:

(a) The security or transaction is exempt under section 3 of this act;[1/]

(b) The security or transaction is not subject to, or is exempt from, the registration requirements of the Securities Act of 1933[2/] and the rules and regulations thereunder, other than by reason of section 3(a) or 3(b) of such act and the rules and regulations under said section 3(a) or 3(b), and a report of the offering is filed with the bureau of the issuer, the total amount of the securities sold, the price at which the securities were sold, the total number of purchasers of the securities, and the names and addresses of the purchasers of the securities, indicating the number and amount of the securities each purchased. The fee for filing the report with the bureau shall be $250.00. The information in the report of sale shall be deemed confidential and shall not be disclosed to the public except by order of the court or in court proceedings;

(c) (Deleted by amendment; P.L. 1985, c. 405.)

[1/] Section 49:3-50.

[2/] 15 USCA § 77a *et seq.*

(d) (Deleted by amendment; P.L. 1985, c. 405.); or

(e) The security is registered under this act.

49:3-51. Scope of act

(a) Sections [49:3-60] of this act apply to persons who sell or offer to sell when (1) an offer to sell is made in this State or (2) an offer to buy is made or accepted in this State;

* * *

(c) For the purpose of this section, an offer to sell or to buy is made in this State, whether or not either party is then present in this State, when the offer (1) originates from this State or (2) is directed by the offeror to this State and received at the place to which it directed (or at any post office in this State in the case of a mailed offer). . . .

FACTS

The Registration Statements

9. Imatec, Ltd. is incorporated in the State of New York, and is located at 150 East 58th Street, New York, New York. It develops, designs, markets and licenses image reproduction and enhancement technology.

10. On May 13, 1996, Imatec filed a registration statement, on Form SB-2 (and on subsequent dates filed amendments thereto), with the Securities and Exchange Commission.

11. On May 21, 1996, Imatec filed with the Bureau of Securities an application to register an offering by coordination, pursuant to N.J.S.A. 49:3-61.1. As part of its review of Imatec's registration statement, the Bureau issued a comment letter, dated June 26, 1996, with requests for information. Counsel for the underwriter, Orrick, Herrington & Sutcliffe LLP ("Orrick"), responded by letter dated July 9, 1996.

12. During the course of its review, the Bureau expressed various concerns regarding the Imatec offering to underwriter's counsel. The Bureau informed underwriter's counsel that it was considering the issuance of a stop order based on, among other things, Imatec's financial condition. By letter dated August 7, 1996, Orrick requested that a stop order not be entered.

13. By letter dated August 8, 1996, Orrick requested permission to withdraw Imatec's application for registration in New Jersey, and agreed to entry of a consent order denying specific exemptions.

14. By Notice of Withdrawal, dated August 13, 1996, the Bureau granted Imatec's request for withdrawal. On October 23, 1996, Imatec and the Bureau of Securities entered into a consent order denying certain exemptions (the "Consent Order").

15. Although registration in New Jersey was withdrawn, Imatec securities were qualified for offer and sale to the public in sixteen other jurisdictions.

The Initial Public Offering

16. The registration statement filed with the SEC for the Imatec offering was declared effective at 4:00 p.m. on October 28, 1996.

17. On October 29, 1996, Orrick submitted to A.S. Goldmen a Final Blue Sky Memorandum stating that sales of the securities may be made, subject to certain conditions, in the following jurisdictions: California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Louisiana, Maryland, Nevada, New York, Rhode Island, Utah and Wyoming.

18. A.S. Goldmen began selling the Imatec offering at 9:30 a.m. on October 29, 1996. As is its practice, A.S. Goldmen programmed its trading computers to block sales of Imatec securities to residents of states, including New Jersey, in which Imatec was not qualified for sale. A.S. Goldmen's brokers also were told by the firm's Compliance Department that Imatec securities could not be sold to New Jersey residents — or to residents of any other state where the securities had not been qualified for sale.

19. At 2:49 p.m., with the Imatec offering fully sold, A.S. Goldmen began trading Imatec in the after-market. As a Nasdaq market maker, A.S. Goldmen stands willing to make a market in Imatec, and continues to buy and sell such securities.

The Controversy

20. On the afternoon of Thursday, November 7, 1996, the Bureau contacted outside legal counsel for A.S. Goldmen to inquire whether Imatec had gone public. In discussions that followed, the Bureau expressed its concern

that A.S. Goldmen had violated the New Jersey Securities Act (the "Securities Act") and the Consent Order. The Bureau also announced that A.S. Goldmen had acted in "bad faith."

21. Counsel for A.S. Goldmen made clear to the Bureau that the Imatec securities were sold pursuant to the SEC registration statement and the Blue Sky laws of the states in which Imatec was qualified for sale.

22. The Bureau stated that its position was that any sale of securities from New Jersey to any other jurisdiction — irrespective of whether the securities were qualified for sale in that jurisdiction — violated of the New Jersey Securities Act if the securities were not registered or exempt from registration in New Jersey.

23. Richard Barry, the Supervisor of Enforcement at the Bureau, was particularly belligerent in his interchanges with counsel. He repeatedly told counsel to "prepare your papers for court," stating that "one hundred lawyers playing violins" would not dissuade him from his conviction that A.S. Goldmen had violated the law, and had done so in "bad faith." During these "discussions," Mr. Barry slammed the telephone down and hung up on counsel. Mr. Barry told counsel that A.S. Goldmen was on "notice" that it was violating the New Jersey Securities Act, and that further offers or sales of Imatec securities would result in criminal penalties.

24. The following afternoon, Friday, November 8, 1996, Mr. Barry and two other Bureau investigators arrived at A.S. Goldmen to seize documents.

The Controversy is Ripe

25. This controversy is ripe. First, the parties' interests are adverse, and irreparable harm will result to A.S. Goldmen if judgment is not entered declaring that the New Jersey Securities Act, as applied here, is unconstitutional. The Bureau has informed A.S. Goldmen that each sale of Imatec securities violates the New Jersey Securities Act — punishable at up to $20,000 per sale. The Bureau also has stated that it intends immediately to seek a Cease and Desist Order against A.S. Goldmen that would prohibit it from trading in Imatec securities. Because A.S. Goldmen is a Nasdaq market maker for Imatec, A.S. Goldmen will suffer irreparable harm if it is not permitted to trade these securities. Further irreparable harm will result to stockholders of Imatec who rely upon A.S. Goldmen as a primary market maker to assure an active market for Imatec securities.

26. Second, the declaratory judgment will be conclusive. The facts here are not in dispute. A.S. Goldmen sold securities not registered or exempt from registration in New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale. A declaration will establish conclusively whether these sales violated the New Jersey Securities Act and the Consent Order, and whether the New Jersey Securities Act as applied in these circumstances violates the Commerce Clause of the United States Constitution.

CLAIMS FOR RELIEF

COUNT ONE
(Declaratory Judgment)

27. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 26.

28. The Bureau's attempt to prevent A.S. Goldmen from selling Imatec securities to residents of states in which the securities are qualified for sale violates the Commerce Clause of the United States Constitution. New Jersey has no legitimate interest in protecting non-resident purchasers whose home states have determined that the offering met their own state's standards. To permit otherwise would give the Bureau of Securities an effective veto over offerings and sales approved by the SEC and securities officials from other states, even though no purchases were made by — or directed to — New Jersey residents.

29. Nor is the business reputation of the State of New Jersey at stake here. This is not a case where a broker-dealer used a New Jersey office as a base to conduct fraudulent sales in other states. Rather, registered brokers sold securities that were registered with the SEC to residents of states in which the securities were qualified for sale.

30. The New Jersey Securities Act, as applied in this case, directly burdens interstate commerce. But even if the burden imposed is only incidental, it is excessive, because New Jersey has no legitimate interest in policing the non-fraudulent sale of securities in other states.

31. Accordingly, the purported effort by the Bureau of Securities to apply the New Jersey Securities Act to prohibit brokers located in New Jersey from selling securities

that are not registered or exempt from registration in New Jersey to residents of states in which the securities are qualified for sale violates the Commerce Clause of the United States Constitution.

COUNT TWO
(Declaratory Judgment)

32. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 31.

33. Accordingly, the New Jersey Securities Act does not prohibit brokers located in New Jersey from selling securities that are not registered or exempt from registration in New Jersey to residents of states in which the securities are qualified for sale.

COUNT THREE
(Declaratory Judgment)

34. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 33.

35. The Consent Order does not apply to sales of Imatec securities to residents of states in which the securities are qualified for sale. The Consent Order states that "the use of the specific exemptions in *N.J.S.A.* 49:3-50(b) (2), (9), (11) and (12) for the securities of Imatec, Ltd. are denied effective upon entry of this Consent Order." Because the Consent Order denied exemption from registration, and because the securities were not otherwise registered, Imatec securities could not be offered or sold to New Jersey residents. That is all the Consent Order required.

36. Accordingly, the Consent Order does not prohibit A.S. Goldmen brokers located in New Jersey from

selling securities that were not registered or exempt from registration in New Jersey to residents of states in which the securities were qualified for sale.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment:

(i) adjudging, decreeing and declaring that the New Jersey Securities Act, as applied to securities that were not registered or exempt from registration in New Jersey and were sold by brokers located in New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale, violates the Commerce Clause of the United States Constitution;

(ii) adjudging, decreeing and declaring that the New Jersey Securities Act does not apply to securities that were not registered or exempt from registration in New Jersey and were sold by brokers located in New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale;

(iii) adjudging, decreeing and declaring that the Consent Order does not apply to securities that were not registered or exempt from registration in New Jersey and were sold by brokers located in New Jersey to residents of states (other than New Jersey) in which the securities were qualified for sale; and

(iv) granting such other and further relief as the Court deems just and proper.

Dated: Princeton, New Jersey
November 11, 1996

SAUL, EWING, REMICK & SAUL

By: /s/ Michael A. Lampert
Michael A. Lampert (ML-1064)
214 Carnegie Center, Suite 202
Princeton, New Jersey 08540
(609) 452-3100

-and-

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
Martin Flumenbaum (MF-9067)
Brad S. Karp (BK-3702)
1285 Avenue of the Americas
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Attorneys for Plaintiff A.S. Goldmen & Co., Inc.

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

By: Joshua T. Rabinowitz (JR-1636)
Deputy Attorney General
Division of Law
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07101
Tel. (201) 648-2500
Attorney for the New Jersey Bureau of Securities

UNITES STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

A.S. GOLDMEN & CO., INC.	HONORABLE DICKENSON DEBEVOISE
Plaintiff,	Civil Action No. 96-5280 (DRD)
v.	
NEW JERSEY BUREAU OF SECURITIES,	NOTICE OF MOTION
Defendants.	

PLEASE TAKE NOTICE that, upon the affidavits of Roger N. Walter, Richard W. Barry and Sonya Still, the accompanying memorandum of law and Rule 12G Statement and all prior papers and proceedings herein, the New Jersey

Bureau of Securities will move before this Court (the Honorable Dickenson R. Debevoise) at the Martin Luther King, Jr. Federal Building and Courthouse, 50 Walnut Street, Newark, New Jersey, on Monday, February 10, 1997 at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that the Bureau is entitled to summary judgment that: (a) Section 60 of the New Jersey Securities Law, *N.J.S.A.* 49:3-47 to 76, applies to sales of securities by broker-dealers located in New Jersey to customers located in states where the securities are qualified for sale; and (b) the application of Section 60 to sales by A.S. Goldmen & Co., Inc. from its New Jersey office of the securities of Imatec, Ltd., which are not qualified for sale in New Jersey, to customers in states where the securities are qualified for sale does not violate the Commerce Clause, Art. I, §8, cl. 3, of the United States Constitution.

PLEASE TAKE FURTHER NOTICE, that, unless otherwise ordered by the court, answering papers, if any, shall be filed at the Clerk's office and served no later than January 27, 1997.

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for
New Jersey Bureau of Securities
Division of Law
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07101
Tel. (201) 648-2500

By: /s/ Joshua T. Rabinowitz
Joshua T. Rabinowitz (JR1636)
Deputy Attorney General

Dated: Newark, New Jersey
January 17, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

----------x

A.S. GOLDMEN & COMPANY, INC.,	Civil Action No. 96-5280 (DRD)
Plaintiff,	**NOTICE OF CROSS-MOTION**
- against -	
NEW JERSEY BUREAU OF SECURITIES,	
Defendant.	

----------x

PLEASE TAKE NOTICE THAT, upon the complaint in this matter, the affidavits of Brad S. Karp and Jay K. Musoff, the exhibits annexed thereto, the accompanying memorandum of law, Rule 12(g) Statement and all other papers previously submitted to the Court by plaintiff, A.S. Goldmen & Company, Inc. shall move this Court, on April 28, 1997, at 10:00 a.m., or as soon thereafter as counsel may be heard, at the Courthouse, 50 Walnut Street, Martin Luther King, Jr. Federal Building and Courthouse, Newark, New Jersey, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that A.S. Goldmen is entitled to judgment that the application of the New Jersey Uniform Securities Law to prohibit brokers located in New Jersey from soliciting, offering or selling securities that are not registered or exempt from registration in New Jersey to residents of states (other than New Jersey) in which the securities are qualified for sale violates the Commerce Clause

of the United States Constitution. The basis for plaintiff's cross-motion is set forth in its accompanying memorandum of law.

Plaintiff requests oral argument on this cross-motion.

Dated: New York, New York
April 7, 1997

Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

By: /s/ Brad Karp
Martin Flumenbaum (MF-9067)
Brad S. Karp (BK-3702)

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Attorneys for Plaintiff A.S. Goldmen & Co., Inc.

UNITES STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

A.S. GOLDMEN & CO., INC.	Civil Action No. 96-5280 (DRD)
Plaintiff,	AFFIDAVIT
- against -	
NEW JERSEY BUREAU OF SECURITIES,	
Defendant.	

STATE OF NEW YORK)
) .ss.:
COUNTY OF NEW YORK)

Marlene Reed, being duly sworn states:

1. I am an attorney associated with the law firm of Orrick, Herrington & Sutcliffe LLP ("Orrick, Herrington"). I submit this affidavit in support of the motion by A.S. Goldmen & Co., Inc. ("A.S. Goldmen") for a judgment declaring that the New Jersey Bureau of Securities' (the "Bureau of Securities") application of the New Jersey Uniform Securities Law to prohibit brokers located in New Jersey from soliciting, offering or selling Imatec, Ltd. ("Imatec") securities to residents of states (other than New Jersey) in which the securities are qualified for sale violates the Commerce Clause of the United States Constitution, and for a permanent injunction enjoining the Bureau of Securities from taking any action that prohibits A.S. Goldmen from soliciting, offering or selling Imatec securities to residents of states in which the securities are qualified for sale. I am fully familiar with the facts set forth herein, either on the basis of personal knowledge or from the records of Orrick, Herrington.

Orrick, Herrington Served as Underwriter's Counsel

2. Orrick, Herrington served as counsel to A.S. Goldmen in connection with the recent initial public offering of Imatec securities underwritten by A.S. Goldmen.

3. Orrick, Herrington, a major national law firm, frequently serves as counsel to underwriters in connection with public offerings of securities. I have been involved in the representation of underwriters in connection with numerous public offerings.

4. In my experience as a Blue Sky lawyer, I have never worked on a securities transaction in which a state securities department, commission or bureau purported to require that securities be qualified for offer or sale in the state

in which the broker was located, in addition to the state in which the investor resides.

The New Jersey Consent Order

5. On May 13, 1996, Imatec filed a registration statement, on Form SB-2 and on subsequent dates filed amendments thereto, with the United States Securities and Exchange Commission ("SEC").

6. On May 21, 1996, Imatec filed with the Bureau of Securities an application to register its offering by coordination, pursuant to N.J.S.A. 49:3-61.1. As part of its review of Imatec's registration statement, the Bureau of Securities issued a comment letter, dated June 26, 1996, with requests for information. Orrick, Herrington responded by letter dated July 9, 1996.

7. During the course of its review, the Bureau of Securities expressed various concerns regarding the Imatec offering to Orrick, Herrington. The Bureau of Securities informed Orrick, Herrington that it was considering the issuance of a stop order based on, among other things, Imatec's financial condition. By letter dated August 7, 1996, Orrick, Herrington, on behalf of Imatec, requested that a stop order not be entered.

8. During discussions regarding a stop order, I informed the Bureau of Securities that if a stop order were issued, Imatec would be unable to offer and sell its securities to residents of other states in which the securities were qualified for offer or sale, and that Imatec intended to offer and sell its securities in those other states.

9. By letter dated August 8, 1996, Imatec requested permission to withdraw its application for

registration in New Jersey, and agreed to entry of a consent order denying specific exemptions.

10. By Notice of Withdrawal, dated August 13, 1996, the Bureau of Securities granted Imatec's request for withdrawal. On October 23, 1996, Imatec and the Bureau of Securities entered into a consent order denying certain exemptions (the "Consent Order").

11. The Consent Order did not say that A.S. Goldmen could not offer or sell Imatec securities "from" its office in New Jersey to residents of states in which the securities were qualified for offer and sale. All that the Consent Order did was deny certain exemptions under New Jersey law.

12. During the discussions surrounding the Consent Order, the Bureau of Securities *never* expressed to me or, to the best of my knowledge, to anyone else at Orrick, Herrington — orally or in writing — the position that the Consent Order would bar sales of Imatec securities *from* A.S. Goldmen's office in New Jersey to residents of the states in which the securities were qualified for offer or sale. Moreover, during our discussions, I told representatives of the Bureau of Securities that Imatec's securities were intended to be offered for sale to residents of other states in which such securities were qualified for offer or sale. The first time that I or, to the best of my knowledge, anyone at Orrick, Herrington heard that the Bureau of Securities was taking that position was on November 7, 1996, 15 days after the Consent Order was entered into and 9 days after A.S. Goldmen began selling Imatec securities to residents of the states in which the securities were qualified.

Orrick, Herrington's Final Blue Sky Memorandum

13. The registration statement filed with the SEC for the Imatec offering was declared effective at 4:00 p.m. on October 28, 1996.

14. Although registration in New Jersey was withdrawn, Imatec, securities were qualified for offer and sale to the public in sixteen other jurisdictions.

15. On October 29, 1996, Orrick, Herrington submitted to A.S. Goldmen a Final Blue Sky Memorandum with respect to the Imatec offering. A true and correct copy of the Final Blue Sky Memorandum is annexed hereto as Exhibit A. The Final Blue Sky Memorandum stated that offers and sales of securities may be made, subject to certain conditions, in the 16 jurisdictions in which the securities were qualified, which are listed on page 3. The 37 jurisdictions, including New Jersey, in which the securities were not qualified are listed on page 4.

16. Moreover, the conclusions embodied in the Final Blue Sky Memorandum were consistent with the National Securities Market Improvement Act of 1996, new legislation enacted by Congress only last month (October 1996) which greatly reduces the role of the states in the registration of securities. That statute preempts state securities laws with respect to the registration and sale of certain

securities. Nasdaq SmallCap Market securities — such as Imatec securities — are largely exempt from state securities laws after twenty-five calendar days after the effective date of their prospectus or twenty-five days after their initial offering to the public. With respect to the Imatec offering, the twenty-fifth day is November 23, 1996.

/s/ Marlene Reed
Marlene Reed

Sworn to before me this
18th day of November, 1996

/s/ Shufy H. Pongnon
Notary Public

SHUFY H. PONGNON
Notary Public State of New York
No. 01P05055191
Qualified in Kings County
Commission Expires Feb. 5, 1998

Exhibit A

ORRICK, HERRINGTON & SUTCLIFFE LLP

IMATEC, LTD.

1,000,000 Shares of Common Stock and 4,000,000 Redeemable Warrants

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FINAL BLUE SKY MEMORANDUM

October 29, 1996

OFFERS AND SALES TO THE PUBLIC BY REGISTERED BROKERS OR DEALERS

As indicated in the Preliminary Blue Sky Memorandum, action has been taken to qualify the Securities for *offer* and *sale* to the public in the jurisdictions listed below. It is now believed that *offers* and *sales* of the Securities to the public may be made in the jurisdictions listed below and the indicated amounts, but only by broker-dealers licensed in those jurisdictions, subject to the following footnotes. *Offers* and *sales* of the Securities in excess of the amounts indicated should be limited to the institutional investors listed in Section II of the Preliminary Blue Sky Memorandum.

California[1]	Entire Offering
Colorado	Entire Offering
Connecticut	26,315
Delaware	3,508
District of Columbia	Entire Offering
Florida	Entire Offering
Georgia	Entire Offering
Hawaii	Entire Offering
Illinois	35,087
Louisiana	10,526
Maryland	26,315
Nevada	17,543
New York[2]	Entire Offering
Rhode Island	10,526
Utah	Entire Offering
Wyoming	35,087

(1) Clear under a Limited Qualification.

(2) A Further State Notice has been filed for A.S. Goldmen & Co., Inc.

ORRICK, HERRINGTON & SUTCLIFFE LLP

IMATEC, LTD.

1,000,000 Shares of Common Stock and 4,000,000 Redeemable Warrants

---

FINAL BLUE SKY MEMORANDUM

October 29, 1996

A.S. Goldmen & Co., Inc.
99 Wood Avenue South
Suite 902
Iselin, New Jersey 08830

Ladies and Gentlemen:

Based on the latest information available to us, we submit herewith a Final Blue Sky Memorandum (the "Memorandum") to you with respect to the proposed public offering by you of the above-mentioned 1,000,000 shares of Common Stock (plus up to 150,000 shares to cover over-allotments, if any) and 4,000,000 Redeemable Warrants (plus up to 600,000 Redeemable Warrants to cover over-allotments, if any) (hereinafter the shares of Common Stock and the Redeemable Warrants to be collectively referred to as the "Securities") of the above-mentioned Imatec, Ltd. (the "Company"). A registration statement on Form SB-2 and Amendment Nos. 1, 2, 3 and 4 thereto, with respect to the Securities (the "Registration Statement") were filed with the Securities and Exchange Commission (the "Commission"). Sales of the Securities, subject to the conditions set forth in

the Memorandum, are permissible after the effective date of the Registration Statement with the Commission. The Registration Statement was declared effective at 4:00 P.M., New York time, October 28, 1996.

The Memorandum is concerned primarily with the distribution of the Prospectus in the form filed with the Commission and with the offer and sale of the Securities in the jurisdictions herein referred to by persons registered as brokers or dealers under the securities laws of such jurisdictions. We have indicated, however, selected classes of persons in a number of such jurisdictions to whom the Securities may be offered and sold and the Prospectus distributed by persons not registered therein as dealers or brokers. We do not purport to cover, however, the question of whether the Securities will be a legal investment for such classes of persons. The Memorandum does not cover the requirements or restrictions, if any, with respect to other advertising matter that may be used in any of the jurisdictions covered.

The Memorandum is concerned primarily with updating the Preliminary Blue Sky Memorandum dated August 12, 1996 submitted to you with respect to the offering described above.

The Memorandum is based upon our examination of the securities laws of the several jurisdictions and the rules and regulations, where published, of the authorities administering such laws, all as reported in standard unofficial compilations (our most recently reviewed supplement to which was dated June 24, 1996). Special rulings from such authorities have not been obtained. We are not admitted to practice in any states except California and New York, nor have we obtained opinions of local counsel in other jurisdictions. The statements made in the Memorandum are

subject to the qualification that broad discretionary powers exist in the securities commissions or other administrative agencies of many jurisdictions, authorizing them, among other things, to withdraw the exempt status accorded to particular transactions and classes of securities by statute, to impose special requirements with respect to any offering of securities, and to prohibit or restrict the distribution of the Prospectus.

Any statement herein with respect to sales to banks, savings institutions, trust companies, insurance companies or other institutions refers only to requirements of the securities laws relating to such sales and does not purport to cover the question of whether the Securities will be legal for investment by such institutions. The Memorandum is furnished for general information purposes only and is not to be relied upon as an opinion of counsel.

Under no circumstances is the Memorandum to be considered an offer to sell or the solicitation of an offer to buy the Securities.

ORRICK, HERRINGTON & SUTCLIFFE LLP

At this time it has been determined not to take action required to obtain an exemption from the registration or filing requirements or otherwise qualify the Securities for *offer* or *sale* to the public in the jurisdictions listed below. Accordingly, *offers* or *sales* of the Securities in the jurisdictions listed below should be limited to the institutional purchasers listed in Section II of the Preliminary Blue Sky Memorandum.

Alabama	Maine	New Mexico	Tennessee
Alaska	Massachusetts	North Carolina	Texas
Arizona	Michigan	North Dakota	Vermont
Arkansas	Minnesota	Ohio	Virginia
Guam	Mississippi	Oklahoma	Washington
Idaho	Missouri	Oregon	West Virginia
Indiana	Montana	Pennsylvania	Wisconsin
Iowa	Nebraska	Puerto Rico	
Kansas	New Hampshire	South Carolina	
Kentucky	New Jersey	South Dakota	

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

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P.O. Box 45029
Newark, New Jersey 07101
Tel. (201) 648-2500
Attorney for the New Jersey Bureau of Securities

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

A.S. GOLDMEN & COMPANY, INC.	HONORABLE DICKENSON DEBEVOISE
Plaintiff,	Civil Action No. 96-5280 (DRD)
v.	RULE 12(G) STATEMENT
NEW JERSEY BUREAU OF SECURITIES,	
Defendant.	

Defendant New Jersey Bureau of Securities submits the following statement, pursuant to Rule 12(G) of the Federal Rules of Civil Procedure, of what material facts are not in dispute and what nonmaterial facts are in dispute in connection with its motion for summary judgment in the above captioned action.

STATEMENT OF FACTS THAT ARE NOT IN DISPUTE

The Parties

1. A. S. Goldmen & Company, Inc. ("Goldmen") is a securities broker dealer and investment bank with its principal place of business at 99 Wood Avenue South, Iselin, New Jersey. November 13, 1996, affidavit of Foster Gibbons, ("Gibbons Aff"), ¶ 2.

2. The New Jersey Bureau of Securities is an agency of the New Jersey Department of Law, Division of Consumer Affairs, with offices at 153 Halsey Street, Newark, New Jersey. It is responsible for administering the New Jersey Uniform Securities Law, *N.J.S.A.* 49:3-47 to 76. Gibbons Aff. 13 and *N.J.S.A.* 49:3-66.

The Application To Register the Imatec Securities In New Jersey

3. Imatec, Ltd ("Imatec") is incorporated in the State of New York and is located at 150 East 58th Street, New York, New York. It develops, designs, markets and licenses image production and enhancement technology. Gibbons Aff., ¶ 4.

4. Imatec is a development stage company which had earned only nominal revenues. As of December 31, 1995 and August 31, 1996 it had an accumulated deficit of $1,250,109 and $2,837,005 respectively. November 19, 1996 affidavit of Richard W. Barry ("First Barry Aff."), ¶ 14.

5. On May 13, 1996, Imatec filed a registration statement with the Securities and Exchange Commission

("SEC") and on subsequent dates filed amendments thereto. Gibbons Aff., ¶ 5.

6. On May 21, 1996, Imatec filed an application with the Bureau to register the offering in New Jersey. Gibbons Aff. ¶ 6. The application listed Goldmen as the sole underwriter. First Barry Aff., ¶ 14.

7. At the time the Bureau received Imatec's application it had already commenced an investigation of Goldmen. During that investigation it had discovered that Goldmen's business was concentrated in underwriting the public offerings of a handful of low priced over-the-counter ("OTC") securities and then selling those same securities in the secondary market. First Barry Aff. ¶ 13.

8. Because of Imatec's financial condition and Goldmen's business practices, the Bureau was concerned that the Imatec securities were a type of risky investment associated with illegal practices including manipulation, illegal markups and failure to disclose risk factors. First Barry Aff. ¶ 4.

9. The Bureau was also concerned that if it permitted Goldmen to sell the Imatec securities from New Jersey to out-of-state customers, then, because there is no filing requirement for transactions in the secondary market, Goldmen could delay Bureau scrutiny of sales to customers in New Jersey by the following three step process: (1) sell the public offering to cooperating out-of-state customers; (2) repurchase the securities from the cooperating customers; and (3) then sell the securities to customers in New Jersey in the secondary market. This scheme is much easier to identify and prevent when every public offering of low priced securities that is sold from New Jersey is subject to New

Jersey's securities registration requirement. First Barry Aff., ¶¶ 11, 12.

10. As part of the application process, the Bureau advised the underwriter's counsel, Orrick, Herrington & Sutcliffe ("Orrick") that it needed additional information, that it had concerns about Imatec's financial condition and that it was considering the issuance of a stop order. Gibbons Aff., ¶¶ 6-7.

11. By letter dated August 7, 1996, Orrick asked the Bureau to refrain from entering a stop order. Gibbons Aff. ¶ 7.

12. By letter dated August 8, 1996, Orrick requested permission to withdraw Imatec's application for registration in New Jersey. Gibbons Aff., ¶ 8. In the same letter, Orrick represented that: (a) '[t]here have been no offers or sales made in your state, nor will there be any offers or sales made in your state relating to this offering unless otherwise registered or an exemption from registration is available;" and (b) "the company will consent not to sell any of its securities under any of the non-issuer exemptions provided for under N.J.S.A. 49:3-50(b)." First Barry Aff., ¶ 16.

13. *N.J.S.A.* 49:3-60 ("Section 60") states that it "is unlawful for any security to be offered or sold in this State unless" it is registered or qualifies for an exemption. *N.J.S.A.* 49:3-51, which defines the scope of the New Jersey Securities Law, *N.J.S.A.* 49:3-47 to 76 (the "Act"), states that: (a) Section 60 applies when an offer to sell is made in this State; and (b) an offer to sell is made in New Jersey whenever the offer "originates from this State."

14. On August 13, 1996, the Bureau granted Imatec's request for withdrawal. Gibbons Aff., ¶ 9.

The Consent Order

15. After the Bureau issued the notice of withdrawal it engaged in negotiations with Orrick which resulted in a consent order (the "Consent Order") that was signed by the Bureau and Imatec and was entered on October 23, 1996. First Barry Aff., ¶ 18.

16. The Consent Order denied some of the exemptions that the Orrick Firm had represented in the August 8, 1996 letter that Imatec would agree to accept. Specifically, it denied the exemptions in *N.J.S.A.* 49:3-50(b)(2), (9), (11) and (12). First Barry Aff., ¶ 18.

17. The Consent Order did not deny the exemption in *N.J.S.A.* 49:3-50(b)(3) for "any nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy" or the exemption in *N.J.S.A.* 49:3-50(b)(8) for "any offer or sale to [certain financial institutions] or to a broker-dealer, whether the purchaser is acting for itself or in a fiduciary capacity." First Barry Aff., ¶ 20.[1/]

18. The Consent Order did, however, deny the so called "manual exemption" in *N.J.S.A.* 49:3-50(b)(2) and, as a result, prevented brokers from soliciting members of the public to buy Imatec securities in the secondary market in New Jersey. First Barry Aff., ¶ 19.

[1/] The First Barry Aff. has two paragraphs 20. This refers to the first.

The Final Blue-Sky Memorandum

19. On October 29, 1996, Orrick submitted a Final Blue Sky Memorandum (the "Memorandum") to Goldmen in connection with the Imatec Offering. Gibbons Aff., ¶ 12.

20. The Memorandum stated that sales of the Imatec securities may be made, subject to certain conditions, in 16 states. Gibbons Aff., ¶ 12.

21. The Memorandum was silent on whether Goldmen could sell Imatec securities from New Jersey without violating Section 60. Exhibit A to the November 19, 1996 affidavit of Marlene Reed.

Goldmen Sells the Public Offering and Engages In the Seconday Market

22. The registration that Imatec had filed with the SEC became effective on October 28, 1996. Gibbons Aff., ¶ 11.

23. The prospectus that Imatec filed with the SEC did not disclose that the Imatec securities were not registered in New Jersey or that Imatec had entered the Consent Order. Barry Aff., ¶ 21.[2/]

24. At 9:30 a.m. on October 29, 1996, Goldmen began selling the offering of Imatec securities from its office in New Jersey. Goldmen sold the entire offering by 2:49 p.m. Gibbons Aff., ¶¶ 13-14.

[2/] The First Barry Aff. has two paragraphs 21. This refers to the second.

25. After the offering was sold out, Goldmen acted as a market maker for Imatec and continued to buy and sell Imatec securities. *Id.*, ¶ 14.

26. From October 29, 1996 to the present, Goldmen was one of five market-makers in Imatec securities. First Barry Aff., ¶ 20.[3/]

The Cease and Desist Order

27. On November 7, 1996, Richard Barry, the Supervisor of Enforcement at the Bureau, spoke to Goldmen's outside counsel and learned that Goldmen had sold, and was continuing to sell, Imatec securities from its New Jersey office to the public. First Barry Aff., ¶ 22.

28. Barry advised Goldmen's outside counsel that any further sales of Imatec's securities to the public would constitute wilful violations of the Securities Act and would be subject to civil, criminal and administrative penalties. First Barry Aff. ¶ 22.

29. On Friday, November 8, 1996, Barry visited Imatec's offices and advised Goldmen's general counsel, Foster Gibbons, that any further sales of Imatec's securities to the public would constitute wilful violations of the Securities Act and would be subject to civil, criminal and administrative penalties. First Barry Aff., ¶ 23.

30. Gibbons responded that Goldmen intended to continue selling Imatec securities from New Jersey. First Barry Aff., ¶ 23.

[3/] The First Barry Aff. has two paragraphs 20. This refers to the second.

31. On the same day, the Bureau advised Goldmen's outside counsel that if Goldmen continued to sell Imatec securities from New Jersey, the Bureau would issue a cease and desist order on the next business day, *i.e.*, Tuesday, November 12, 1996. November 19, 1996 affidavit of Richard F. Thayer, ¶¶ 2, 3.

The Commencement of This Action

32. Goldmen commenced this action on Tuesday, November 12, 1996. The complaint sought declaratory judgments that: (a) applying the New Jersey Securities Act (the "Act") to prohibit brokers located in New Jersey from selling securities that are not registered or exempt from registration in New Jersey to residents of states in which the securities are qualified for sale violates the Commerce Clause of the United States Constitution;" (b) the Act does not prohibit brokers located in New Jersey from selling securities that are not qualified for sale in New Jersey to residents of states in which the securities are qualified for sale; and (c) the Consent Order does not prohibit Goldmen brokers located in New Jersey from selling securities that are not qualified for sale in New Jersey to residents of states in which the securities are qualified for sale.

The Cease and Desist Order

33. On the morning of November 13, 1996, the Bureau served Goldmen with an order (the "Cease and Desist Order") to cease and desist from "the solicitation of customers, offer and sale of Imatec in or from the State of New Jersey to any member of the public." Gibbons Aff. ¶ 17.

34. The Cease and Desist Order did not bar Goldmen from engaging in transactions in Imatec securities

with broker-dealers or financial institutions and was not intended to bar Goldmen from engaging in unsolicited transactions in Imatec securities with the public. First Barry Aff., ¶ 24.

35. Because of the statutory exemption for interdealer transactions, neither the Consent Order nor the Cease and Desist Order had any effect on Goldmen's, or any other dealer's, ability to make a market in Imatec securities. *N.J.S.A.* 49:3-50(b)(3).

36. Because of the statutory exemption for interdealer transactions and transactions with financial institutions, neither the Consent Order nor the Cease and Desist Order prevented Goldmen from soliciting other broker-dealers or financial institutions to purchase or sell Imatec securities. *N.J.S.A.* 49:3-50(b)(8).

37. The Cease and -Desist order also did not prevent Goldmen from opening an office in any other state, including a state where the Imatec securities are qualified for sale, and using that office to solicit the public to buy or sell Imatec securities in any state other than New Jersey.

New Jersey's Legitimate Interests[4/]

38. New Jersey has a legitimate interest in protecting its commercial reputation. January 14, 1997 affidavit of Roger N. Walter ("Walter Aff."), ¶ 29.

[4/] The facts set forth in paragraphs 38 to 48 may include facts that defendant Goldmen has disputed or will dispute. The Bureau submits that each of these facts is a matter of common sense and that the Court can, and should, make a finding with respect to each without the need for a hearing.

39. New Jersey has a legitimate interest in protecting in-state customers from becoming victims of fraudulent practices. Walter Aff., ¶ 28.

The Risks Associated With the Sale of Speculative Securities

40. The Imatec securities that Imatec attempted to register for sale in New Jersey in May of 1996 are speculative securities. Walter Aff., ¶ 22, First Barry Aff., ¶¶ 14-15.

41. The sale of low priced, speculative securities, listed for trading on the Nasdaq small cap market or the Over the Counter pink sheets present significant risks to investors. Walter Aff., ¶ 13.

42. These risks include the risks that the brokers who participate in the public offering will sell the securities by means of fraudulent sales practices and will manipulate the prices of the securities in the secondary market immediately following the public offering. Walter Aff., ¶¶ 14-16.

43. If Section 60 did not apply to offers by local brokers to sell speculative securities to out-of-state customers during a public offering of those securities, then a broker could delay, if not totally avoid, Bureau scrutiny of the fraudulent practices associated with sales of those securities in the secondary market immediately following the public offering by the following three-step scheme: (a) the broker sells a public offering that does not qualify for sale in New Jersey to cooperating nonresidents; (b) the broker repurchases the securities from the nonresidents (often at a profit to the nonresidents); and (c) the broker then sells the securities to persons located in New Jersey in the secondary market. First Barry Aff., ¶¶ 11-12.

44. A variation of this three-step scheme is for the underwriter of a public offering to arrange for persons closely associated to it to provide interim financing to the issuer through bridge loans that are paid with the proceeds of the public offering. The bridge loans provide that the lender will be paid his principal and interest plus securities, which usually include redeemable warrants, that are registered as part of the public offering. Upon receipt of the securities, the bridge lenders can perform the same function as the cooperating out-of-state purchasers in the three-step scheme. Walter Aff., ¶¶ 17-18.

45. Some of the risks associated with the use of bridge financing in connection with a public offering of speculative securities are set forth in the complaint that the National Association of Securities Dealers filed against Goldmen in connection with its role as an underwriter of the July 26, 1994 public offering of the common stock and warrants of Innovative Tech Systems, Inc. ("Innovative Tech"). The January 15, 1997 affidavit of Richard W. Barry ("Second Barry Aff."), ¶¶ 9-11.

46. These risks include the risk that the underwriter will manipulate the price of the securities in the secondary market immediately following the public offering, will sell the securities in the secondary market at illegal mark ups and will use fraudulent sales practices to solicit customers in the secondary market. Second Barry Aff., ¶¶ 5-6 and 11.

47. At the time that Imatec applied to the Bureau to register its public offering, the offering presented risks to in-state customers who purchased as part of the public offering as well as these risks to in-state customers who purchased in the secondary market. Second Barry Aff., ¶¶ 12-19.

Applying Section 60 To Offers By Local Brokers To Sell Securities To Out-Of-State Customers Advances New Jersey's Legitimate Interests

48. New Jersey can advance its interest in protecting its commercial reputation by applying Section 60 to local brokers to prohibit them from selling speculative securities that are associated with the use of fraudulent practices to both and out-of-state customers. Walter Aff., ¶¶ 29-33.

49. The Application of Section 60 advances New Jersey's interest in preventing in-state customers from becoming victims of the fraudulent practices associated with the sales of speculative securities by giving the Bureau notice of what securities are being offered for sale from New Jersey and an opportunity to protect in-state residents from the risks that the three-step scheme or a bridge financing scheme presents to in-state customers who will be solicited in the secondary market immediately following the public offering. Second Barry Aff., ¶¶ 23-24, Walter Aff., ¶¶ 13-19 and 34.

STATEMENT OF DISPUTED FACTS[5/]

1. During the discussion of the Consent Order Marlene Reed, Esq. ("Reed"), a lawyer associated with Orrick, told representatives of the Bureau that Imatec's securities were intended to be offered for sale to residents of other states in which the securities were qualified for offer or

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[5/] The Bureau disputes each of the facts listed in this section. Although the Bureau does not believe that any is material to its motion for summary judgment, it has put evidence in the record to prevent Goldmen from gaining any advantage from attempting to use these alleged facts to its advantage.

sale. Compare ¶ 12 of the Reed Aff ¶ 12 with ¶¶ 3-7 of the January 15, 1997 affidavit of Sonya Still (the "Still Aff.").

2. The first time that Reed or anyone else associated with Orrick heard that the Bureau was taking the position that Goldmen could not sell the Imatec securities from New Jersey to customers in states in which they were qualified for sale was on November 7, 1996. Compare ¶ 12 of the Reed Aff. with ¶¶ 5-6 of the Still Aff.

3. The Bureau has taken steps to prohibit Goldmen from making a market in Imatec securities. Compare the November 18, 1996 affidavit of Dr. Hanoch Shalit, ¶ 6, ¶ 8 and ¶ 11, with the undisputed facts about what the Consent Order and the Cease and Desist prohibit Goldmen from doing and ¶¶ 38-39 of the Walter Aff.

Respectfully submitted,

PETER VERNIERO
ATTORNEY GENERAL OF
NEW JERSEY

By: /s/ Joshua T. Rabinowitz
Joshua T. Rabinowitz (JR-1636)
Deputy Attorney General

Dated: Newark, New Jersey
January 15, 1997

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

A.S. GOLDMEN & COMPANY, INC.,	Civil Action No. 96-5280 (DRD)
Plaintiff,	PLAINTIFF'S RULE 12(g) STATEMENT AND RESPONSE TO DEFENDANT'S RULE 12(g) STATEMENT
- against -	
NEW JERSEY BUREAU OF SECURITIES,	
Defendant.	

Pursuant to Rule 12(g) of the Local Rules of the District of New Jersey, plaintiff A.S. Goldmen & Company, Inc. ("A.S. Goldmen") hereby controverts, and contends that there is a genuine issue to be tried with respect to the following facts alleged in the Rule 12(g) Statement of defendant New Jersey Bureau of Securities (the "Bureau"), dated January 15, 1997. A.S. Goldmen does not concede the materiality or relevance of any of the facts set forth herein or in Defendant's Rule 12(g) Statement; indeed, as set forth below, A.S. Goldmen believes that substantially all of the facts alleged in Defendant's Rule 12(g) Statement are immaterial.

STATEMENT OF FACTS ALLEGED BY DEFENDANT TO BE UNDISPUTED

1. Plaintiff does not controvert paragraph 1 of Defendant's Rule 12(g) Statement.

2. Plaintiff does not controvert paragraph 2 of Defendant's Rule 12(g) Statement.

3. Plaintiff controverts paragraph 3 of Defendants' Rule 12(g) Statement to the extent Imatec, Ltd. ("Imatec") is a Delaware corporation with its principal place of business in New York. Imatec develops, designs, markets and licenses image enhancement technologies for application in such markets as medical imagining, graphic arts, computers, cinematography, television and video. (Affidavit of Dr. Hanoch Shalit dated November 18, 1996 ("Shalit Aff.") ¶ 2)

4. Plaintiff controverts paragraph 4 of Defendant's Rule 12(g) Statement to the extent the Bureau omits the fact that Imatec is negotiating the licensing of its patented image enhancement technologies to several renowned corporations

engaged in imaging activities, including medical imaging and imaging for the video and entertainment industries. (Shalit Aff. ¶ 7)

5. Plaintiff does not controvert paragraph 5 of Defendant's Rule 12(g) Statement.

6. Plaintiff does not controvert paragraph 6 of Defendant's Rule 12(g) Statement.

7. Plaintiff controverts paragraph 7 of Defendant's Rule 12(g) Statement to the extent it implies that the underwriting of "low priced, over-the-counter securities" and the sale of those securities in the secondary market is suspect. Plaintiff also controverts paragraph 7 to the extent it implies that the nature of A.S. Goldmen's business, as that of an investment bank, was "discovered" during the Bureau's "investigation."

8. Plaintiff controverts paragraph 8 of Defendant's Rule 12(g) Statement to the extent it implies that A.S. Goldmen's business practices include "manipulation, illegal mark-ups and failure to disclose risk factors." The Bureau has not produced any evidence to support its allegations that A.S. Goldmen engaged in fraud. Nor has the Bureau produced any evidence to substantiate its purported concern that Imatec securities are the type of "risky investment associated with illegal practices."

9. Plaintiff controverts paragraph 9 of Defendant's Rule 12(g) Statement to the extent it alleges the Bureau was concerned that A.S. Goldmen could engage in a hypothetical "three-step scheme" to avoid the registration of securities in New Jersey at the time Imatec filed its application for registration. Prior to the entry of the Consent Order, the Bureau expressed concern over the financial condition of

Imatec. (Affidavit of Marlene Reed dated November 18, 1996 ("Reed Aff.") ¶ 7.) The Bureau never expressed concern regarding this hypothetical "three-step scheme" prior to its motion for summary judgment, nor has it produced a single document that reflects such a concern. Plaintiff also controverts paragraph 9 to the extent it implies that the sale of securities to residents of states in which those securities are qualified for sale would defraud New Jersey investors. Plaintiff further controverts paragraph 9 to the extent it implies that, if every public offering sold from New Jersey is registered in New Jersey, this hypothetical "three-step scheme" would be "much easier" to monitor. The Bureau has produced no evidence that suggests New Jersey residents have been or could be defrauded by this hypothetical scheme, nor has the Bureau produced any evidence that demonstrates that it would be "much easier" to monitor if every public offering sold from New Jersey were required to be registered in New Jersey. Indeed, the Bureau's purported expert, Roger Walter, had never even heard of this "three-step" scheme. (Walter Dep. at 100-01, attached as Exhibit D to the Affidavit of Brad Karp)

10. Plaintiff does not controvert paragraph 10 of Defendant's Rule 12(g) Statement.

11. Plaintiff does not controvert paragraph 11 of Defendant's Rule 12(g) Statement.

12. Plaintiff controverts paragraph 12 of Defendant's Rule 12(g) Statement except refers to the full text of the August 8, 1996 letter, attached as Exhibit A hereto.

13. Plaintiff controverts paragraph 13 of Defendant's Rule 12(g) Statement and refers to the complete text of N.J.S.A. 49:3-51 and 60 ("Section 60"). Plaintiff disputes the constitutionality of the proposed application of

Section 60 to prohibit brokers located in New Jersey from selling securities not registered or exempt from registration in New Jersey to residents of states (other than New Jersey) in which the securities are qualified for sale.

14. Plaintiff does not controvert paragraph 14 of Defendant's Rule 12(g) Statement.

15. Plaintiff does not controvert paragraph 15 of Defendant's Rule 12(g) Statement except refers to the full text of the Consent Order, attached as Exhibit B to the First Barry Aff. ("Consent Order")

16. Plaintiff does not controvert paragraph 16 of Defendant's Rule 12(g) Statement except refers to the full text of the Consent Order.

17. Plaintiff does not controvert paragraph 17 of Defendant's Rule 12(g) Statement except refers to the full text of the Consent Order.

18. Plaintiff controverts paragraph 18 of Defendant's Rule 12(g) Statement to the extent it asserts that the Consent Order prevents brokers from soliciting members of the public to buy Imatec securities in the secondary market in New Jersey, and refers to the full text of the Consent Order.

19. Plaintiff does not controvert paragraph 19 of Defendant's Rule 12(g) Statement.

20. Plaintiff controverts paragraph 20 of Defendant's Rule 12(g) Statement except states that the October 29, 1996 Final Blue Sky Memorandum stated that Imatec securities could be sold in sixteen jurisdictions, subject to certain conditions, and that sales of Imatec securities in the

remaining thirty-seven jurisdictions were limited to certain institutional purchasers, and refers to the full text of the October 29, 1996 Final Blue Sky Memorandum, attached as Exhibit A to the Reed Aff.

21. Plaintiff controverts paragraph 21 of Defendant's Rule 12(g) Statement to the extent it implies that the absence of a reference to Section 60 in the Final Blue Sky Memorandum indicated that brokers located in New Jersey were prohibited from selling Imatec securities to residents of states in which those securities were qualified for sale.

22. Plaintiff does not controvert paragraph 22 of Defendant's Rule 12(g) Statement.

23. Plaintiff controverts paragraph 23 of Defendant's Rule 12(g) Statement to the extent it implies that the prospectus filed by Imatec with the SEC failed to disclose material information.

24. Plaintiff does not controvert paragraph 24 of Defendant's Rule 12(g) Statement.

25. Plaintiff does not controvert paragraph 25 of Defendant's Rule 12(g) Statement.

26. Plaintiff does not controvert paragraph 26 of Defendant's Rule 12(g) Statement.

27. Plaintiff controverts paragraph 27 of Defendant's Rule 12(g) Statement to the extent it states that A.S. Goldmen sold Imatec securities to members of the "public," but fails to state that A.S. Goldmen sold Imatec securities to members of the public who reside in states in which Imatec securities were qualified for sale.

28. Plaintiff controverts paragraph 28 of Defendant's Rule 12(g) Statement to the extent it implies that the position expressed by the Bureau to A.S. Goldmen's outside counsel is correct.

29. Plaintiff controverts paragraph 29 of Defendant's Rule 12(g) Statement to the extent it implies that the position expressed by the Bureau to A.S. Goldmen's counsel is correct.

30. Plaintiff does not controvert paragraph 30 of Defendant's Rule 12(g) Statement.

31. Plaintiff controverts paragraph 31 of Defendant's Rule 12(g) Statement to the extent it implies that the position expressed by the Bureau to A.S. Goldmen's counsel is correct or that the issuance of a Cease and Desist Order was appropriate.

32. Plaintiff does not controvert paragraph 32 of Defendant's Rule 12(g) Statement.

33. Plaintiff controverts paragraph 33 of Defendant's Rule 12(g) Statement to the extent it implies that the position expressed by the Bureau in the Cease and Desist Order it served on A.S. Goldmen is correct.

34. Plaintiff does not controvert paragraph 34 of Defendant's Rule 12(g) Statement.

35. Plaintiff controverts paragraph 35 of Defendant's Rule 12(g) Statement. The Bureau's Cease and Desist Order would prevent A.S. Goldmen from making a market in Imatec securities, notwithstanding the exemption for interdealer transactions. (Affidavit of Foster Gibbons dated November 13, 1996 ("Gibbons Aff.") at ¶¶ 18-20)

36. Plaintiff does not controvert paragraph 36 of Defendant's Rule 12(g) Statement.

37. Plaintiff controverts paragraph 37 of Defendant's Rule 12(g) Statement to the extent it implies that A.S. Goldmen was required to open an office in another state to sell Imatec securities to residents of states in which the securities were qualified for sale.

38. Plaintiff does not controvert paragraph 38 of Defendant's Rule 12(g) Statement.

39. Plaintiff does not controvert paragraph 39 of Defendant's Rule 12(g) Statement, except states that the Bureau's interest in protecting New Jersey residents from becoming victims of fraud must be effected in accordance with the Constitution.

40. Plaintiff controverts paragraph 40 of Defendant's Rule 12(g) Statement to the extent it implies that, because an investment is "speculative," that investment is a vehicle for fraud.

41. Plaintiff controverts paragraph 41 of Defendant's Rule 12(g) Statement to the extent it implies that investment in the NASDAQ Small Cap market or the over-the-counter pink sheets presents "significant" risks to investors.

42. Plaintiff controverts paragraph 42 of Defendant's Rule 12(g) Statement. The Bureau has not alleged that A.S. Goldmen engaged in fraudulent sales practices during the initial offering of Imatec or that the firm manipulated the price of the securities.

43. Plaintiff controverts paragraph 43 of Defendant's Rule 12(g) Statement. Plaintiff disputes that registration of securities in New Jersey is necessary to prevent New Jersey residents from becoming the victims of fraudulent sales practices where the securities are sold to residents of states (other than New Jersey) in which those securities are qualified for sale. Further, the Bureau has produced no evidence that this hypothetical "three-step scheme" has ever occurred, and, indeed, the Bureau's purported expert testified that he had never heard of a "three-step scheme." (Walter Dep. at 100-01)

44. Plaintiff controverts paragraph 44 of Defendant's Rule 12(g) Statement to the extent it implies that A.S. Goldmen engaged in the hypothetical "three-step scheme" with the Imatec bridge financing and for the purpose of defrauding investors. The Bureau has produced no evidence suggesting that the bridge financing of Imatec was fraudulent.

45. Plaintiff controverts paragraph 45 of Defendant's Rule 12(g) Statement except admits that the NASD has filed a complaint against A.S. Goldmen in connection with an entirely different security and transaction. A.S. Goldmen vigorously disputes the allegations in, and novel theories underlying, the NASD complaint.

46. Plaintiff controverts paragraph 46 of Defendant's Rule 12(g) Statement to the extent it implies that A.S. Goldmen manipulated the price of Imatec securities and used fraudulent sales practices to solicit customers to purchase Imatec securities in the secondary market. The Bureau also has produced no evidence suggesting A.S. Goldmen manipulated the price of Imatec securities or engaged in fraudulent sales practices.

46.[1/] Plaintiff controverts paragraph 46 of Defendant's Rule 12(g) Statement to the extent it implies that Imatec securities posed "risks" to investors relating to fraudulent sales practices. Plaintiff further states that the only concern expressed by the Bureau at the time Imatec applied for registration related to the financial condition of Imatec.

47. Plaintiff controverts paragraph 47 of Defendant's Rule 12(g) Statement to the extent it implies that A.S. Goldmen engaged in fraudulent sales practices with respect to Imatec securities.

48. Plaintiff controverts paragraph 48 of Defendant's Rule 12(g) Statement to the extent it implies that A.S. Goldmen engaged in fraudulent sales practices with respect to sales of Imatec securities. Furthermore, plaintiff disputes that the proposed application of Section 60 to prohibit the sale of securities to residents of states, other than New Jersey, in which those securities are qualified for sale, furthers New Jersey's interest in preventing New Jersey residents from becoming victims of fraud. The Bureau also has failed to produce evidence to support its claim that the hypothetical "three-step scheme" has occurred or that registration of securities in New Jersey would protect New Jersey residents from fraud, where the securities are sold to residents of states (other than New Jersey) in which the securities are qualified for sale.

[1/] Because the Bureau submitted two "undisputed" statements of fact under the number 46, A.S. Goldmen controverts these statements with two responses numbered 46.

STATEMENT OF FACTS ALLEGED BY DEFENDANT TO BE DISPUTED

It is inappropriate for a party moving for summary judgment to submit a Statement of Facts Alleged to be *Disputed*. A party moving for summary judgment bears the burden of demonstrating that it is entitled to judgment as a matter of law and that there is *no* genuine issue as to any material fact. The Bureau's purported justification for including such a Statement — *i.e.*, "it has put evidence in the record to prevent Goldmen from gaining any advantage from attempting to use these alleged facts to its advantage" — is both incomprehensible and improper. A.S. Goldmen, therefore, does not respond to the Bureau's Statement of Facts Alleged to be Disputed.

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

1. Imatec filed a registration statement with the Securities and Exchange Commission ("SEC") on May 13, 1996.

2. The registration statement filed with the SEC became effective at 4:00 p.m., October 28, 1996.

3. Orrick, Herrington & Sutcliffe, counsel for A.S. Goldmen, submitted a Final Blue Sky Memorandum on October 29, 1996, stating that A.S. Goldmen could sell Imatec securities, subject to certain conditions, to residents of sixteen states, which states did not include New Jersey.

4. A.S. Goldmen began selling Imatec securities to residents of states in which those securities were qualified for sale at 9:30 a.m. on October 29, 1996.

5. A.S. Goldmen programmed its trading computers to block sales of Imatec securities to residents of states in which Imatec securities were not qualified for sale, which states included New Jersey.

6. After the Imatec offering was completely sold, A.S. Goldmen began trading Imatec securities in the aftermarket.

7. On November 8, 1996, the Bureau informed A.S. Goldmen that it was considering issuing a Cease and Desist Order.

8. On November 12, 1996, A.S. Goldmen filed a declaratory judgment action seeking a finding that the proposed application of Section 60 to prohibit brokers located in New Jersey from soliciting, offering or selling securities that are not registered or exempt from registration in New Jersey to residents of states (other than New Jersey) in which those securities are qualified for sale violates the Commerce Clause of the United States Constitution.

9. On November 13, 1996, the Bureau served on A.S. Goldmen a Cease and Desist Order demanding that A.S. Goldmen immediately cease trading Imatec securities from its New Jersey office.

10. On November 14, 1996, Judge Debevoise entered a temporary restraining order against the Bureau precluding the enforcement of Section 60 against A.S. Goldmen.

11. On November 20, 1996, Judge Debevoise conducted a hearing and entered a preliminary injunction finding that A.S. Goldmen was likely to succeed on the merits of its contention that the application of Section 60 to prohibit

brokers located in New Jersey from soliciting, offering or selling securities that are not registered or exempt from registration in New Jersey to residents of states (other than New Jersey) in which the securities are qualified for sale violates the Commerce Clause of the United States Constitution.

Dated: April 7, 1997

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON

By: /s/ Brad Karp
Martin Flumenbaum (MF-9067)
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Exhibit A

ORRICK, HERRINGTON & SUTCLIFFE

August 8, 1996

(212) 506-5393

VIA FAX (201) 504-3601 &
FEDERAL EXPRESS

Mr. Joseph Allessie
Department of Law and Public Safety
Bureau of Securities
153 Halsey Street, 6th Floor
Newark, New Jersey 07101

Re: Imatec, Ltd.
File No. SR-9277

Dear Mr. Allessie:

Please be advised that we wish to withdraw without prejudice the application filed on behalf of the above-captioned issuer. There have been no offers or sales made in your state, nor will there be any offers or sales made in your state relating to this offering unless otherwise registered or an exemption from registration is available.

Furthermore, the Company will consent not to sell any of its securities under any of the non-issuer exemptions provided for under N.J.S.A. 49:3-50(b).

Very truly yours,

/s/ Marlene Reed
Marlene Reed